

**FEDERAL COURT**

**BETWEEN:**

**VOLTAGE PICTURES LLC**

Plaintiff

- and -

**JOHN DOE AND JANE DOE**

Defendants

- and -

**TEKSAVVY SOLUTIONS INC.**

Responding Party

- and -

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

Intervener

**VOLUME II OF II**

**RECORD OF TEKSAVVY SOLUTIONS INC.**

*(Re: Reasonable Legal Costs, Administrative Costs and Disbursements)*

October 31, 2014

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## TABLE OF CONTENTS

### VOLUME I OF II

<u>Tab</u>	<u>Description</u>	<u>Page</u>
1.	Bill of Reasonable Legal Costs of the Responding Party, TekSavvy Solutions Inc.	1
	<b>A.</b> Stikeman Elliott LLP Invoices and Pre-Bills	8
	<b>B.</b> Supporting Documents re: Disbursements	51
2.	Affidavit of Marc Gaudrault, sworn June 27, 2014	86
	<b>A.</b> <b>Exhibit “A”</b> to the Affidavit of Marc Gaudrault (E-mail chain between C. Tacit and J. Philpott, dated November 13, 2012)	108
	<b>B.</b> <b>Exhibit “B”</b> to the Affidavit of Marc Gaudrault (E-mail chain between N. McHaffie, J. Philpott and others, dated November 13-21, 2012)	111
	<b>C.</b> <b>Exhibit “C”</b> to the Affidavit of Marc Gaudrault (E-mail chain between J. Philpott, N. McHaffie and others, dated November 13-29, 2012)	121
	<b>D.</b> <b>Exhibit “D”</b> to the Affidavit of Marc Gaudrault (Copy of TekSavvy notice to customers, dated December 10, 2012)	134
	<b>E.</b> <b>Exhibit “E”</b> to the Affidavit of Marc Gaudrault (E-mails from N. McHaffie to J. Philpott and others, dated December 16-17, 2012)	137
	<b>F.</b> <b>Exhibit “F”</b> to the Affidavit of Marc Gaudrault (E-mail chain between J. Philpott, N. McHaffie and others, dated November 13 – December 11, 2012)	140
	<b>G.</b> <b>Exhibit “G”</b> to the Affidavit of Marc Gaudrault (E-mail chain between N. McHaffie, J. Philpott and others, dated January 11, 2013)	159
	<b>H.</b> <b>Exhibit “H”</b> to the Affidavit of Marc Gaudrault (E-mail from C. Tacit to M. Gaudrault, dated June 26, 2014)	163
	<b>I.</b> <b>Exhibit “I”</b> to the Affidavit of Marc Gaudrault (Bundle of invoices from C. Tacit to TekSavvy)	166
	<b>J.</b> <b>Exhibit “J”</b> to the Affidavit of Marc Gaudrault (Invoice from Arbor Networks Inc. to TekSavvy, dated September 17, 2013)	200
3.	Affidavit of Pascal Tellier, sworn June 27, 2014	202
4.	Affidavit of Pierre Aubé, sworn July 3, 2014	205
5.	Transcript of Cross-examination of Marc Gaudrault, held October 8, 2014	209
	<b>1.</b> <b>Exhibit “1”</b> to the Cross-examination of Marc Gaudrault (Copy of TekSavvy webpage)	232
6.	Transcript of Cross-examination of Pascal Tellier, held October 8, 2014	234
7.	Transcript of Cross-examination of Pierre Aubé, held October 8, 2014	242

**VOLUME II OF II**

<b><u>Tab</u></b>	<b><u>Description</u></b>	<b><u>Page</u></b>
8.	Affidavit of Barry Logan, sworn July 30, 2014 (with one exhibit)	246
	<b>U. Exhibit “U”</b> to the Affidavit of Barry Logan	264
9.	Affidavit of Steven Rogers, sworn July 31, 2014 (without exhibits)	266
	<b>A. Exhibit “A”</b> to the Affidavit of Steven Rogers	268
	<b>B. Exhibit “B”</b> to the Affidavit of Steven Rogers	334
10.	Affidavit of John Philpott, sworn July 31, 2014 (without exhibits)	337
11.	Transcript of Cross-examination of Barry Logan, held October 9, 2014	350
	<b>1. Exhibit “1”</b> to the Cross-examination of Barry Logan	393
	<b>A. Exhibit “A”</b> to the Cross-examination of Barry Logan	402
12.	Transcript of Cross-examination of Steven Rogers, held October 9, 2014	415
	<b>1. Exhibit “1”</b> to the Cross-examination of Steven Rogers	440
13.	Transcript of Cross-examination of John Philpott, held October 9, 2014	444
14.	Order and Reasons for Order of Prothonotary Aalto, dated February 20, 2014	455
15.	Order and Reasons for Order of Justice Mandamin, dated January 18 and 31, 2013	514
16.	Statement of Claim in Court File No. T-2058-12, filed November 14, 2012	521
17.	Written Representations of TekSavvy Solutions Inc.	531

**Court File No. T-2058-12**

**FEDERAL COURT**

**BETWEEN:**

**VOLTAGE PICTURES LLC**

Plaintiff

**and**

**JOHN DOE and JANE DOE**

Defendants

**AFFIDAVIT OF BARRY LOGAN**

(Sworn on July<sup>3</sup>, 2014)

I, **BARRY LOGAN**, of the City of Stratford, in the province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the owner and principal forensic consultant of Canipre Inc. (“Canipre”), an Ontario based corporation that provides forensic investigation services to copyright owners. Canipre was retained by Voltage Pictures LLC (“Voltage”) to track the illegal downloading and uploading of Voltage’s copyrighted works through the use of Internet Service Providers (“ISPs”) such as TekSavvy Solutions Inc. (“TekSavvy”).

***Background – The Widespread Prevalence of Internet Piracy in Canada***

2. The International Intellectual Property Alliance (“IIPA”) is an American coalition of trade associations affected by intellectual property laws worldwide. They file annual reports to the U.S. Trade Representative (“USTR”) on international developments in intellectual property law. These reports are considered when the USTR files its “Special 301 Report”, a report that

identifies countries that are not properly protecting intellectual property rights. Canada has been identified by the IIPA as a copyright offender on the global stage. The U.S. embassy reports that:

Canada's relatively weak protection and enforcement of intellectual property rights (copyrights, trademarks, patents, and trade secrets) has attracted domestic and international attention. Since 1995, the United States Trade Representative (USTR) has placed Canada on the U.S. Government's Special 301 "Watch List", which designates U.S. trading partners that have particular problems with respect to IPR (Intellectual Property Rights) protection.

For the period 2008 through 2012, Canada was placed on the "Priority Watch List" which identifies the biggest offenders. A copy of the Special 301 report page on the U.S. embassy's website is attached hereto as **Exhibit "A"**.

3. The Special 301 report from 2012, published just prior to the recent amendments to the Copyright Act, stated the following regarding piracy in Canada (at page 25):

Canada remains on the Priority Watch List in 2012, subject to review if Canada enacts long-awaited copyright legislation. The Government of Canada has given priority to that legislation. The United States welcomes that prioritization and looks forward to studying the legislation once it is finalized, and will consider, among other things, whether it fully implements the WIPO Internet Treaties, and whether it fully addresses the challenges of piracy over the internet.

A copy of the 2012 and 2013 Special 301 Report is attached hereto as **Exhibit "B"**.

4. In 2013, as a direct reaction to the current Copyright Act in Canada, Canada was removed from the priority watch list down to the watch list, stating the following at page 46:

USTR is moving Canada to the Watch List in 2013. In June 2012, the United States welcome the passage of the Copyright Modernization Act, which, among other things, is designed to implement Canada's obligations under the WIPO Internet Treaties and to address the challenges of copyright piracy in the digital age.

A copy of the 2013 Special 301 Report is attached hereto as **Exhibit "C"**.

5. The International Intellectual Property Alliance (“IIPA”) concluded the following in its 2014 Special 301 Report on Copyright Protection and Enforcement (at page 103):

It is hard to avoid the conclusion that Canada remains a magnet for sites whose well-understood *raison d’etre* is to facilitate and enable massive unauthorized downloading of pirated versions of feature films, TV shows, record music, entertainment software, and other copyright materials.

...

In this environment, it is not surprising that Canadians continue to demonstrate a formidable propensity to patronize illegal online sources of copyright material, thus stunting the availability and growth of legal alternatives. A report released in September 2012 found that, on a per-capita basis, Canadians download more unauthorized music than residents of any other country, and two-and-one-half times as much as Americans.

A copy of the 2014 IIPA Special 301 Report is attached hereto as **Exhibit “D”**.

6. Canipre regularly monitors piracy of copyrighted materials over the internet and our investigative results have revealed that piracy continues to be rampant in Canada. For example, during a five month monitoring period in 2012, Canipre identified over one million unique Canadian Internet Protocol (“IP”) addresses used to illegally download copyrighted material, including films and music, over the internet. IP addresses are the unique identifiers assigned to individual internet users by their ISP.

7. The widespread acceptance of piracy across Canada greatly affects the ability of rights holders to profit from their products. A 2007 study by Arthur S. De Vany and W. David Wells demonstrates the huge impact that piracy has on the US film industry. The authors looked at a widely released film that was released simultaneously in the U.S., U.K., Spain, and Argentina. They created a model to estimate the impact of piracy on the film’s sales numbers. They found that because of piracy the film lost an estimated US\$41.70 million. The author’s stated that, “the movie’s revenue declined at an average rate of \$4.77 million per week... the rate of revenue

decline was from \$242 to \$621 greater per pirate supplier”. A copy of the study is attached hereto as **Exhibit “E”**.

8. In its 2013 Special 301 Report, the IIPA stated the following at page 123:

...more than C\$1.8 billion and 12,600 full-time equivalent jobs were lost across the entire Canadian economy in 2009-10 as a result of movie piracy. It also estimated direct consumer spending losses to the movie industry, i.e. cinema owners, distributors, producers and retailers, at C\$895 million (US\$898 million); tax losses to government at C\$294 million(US\$295 million); and a loss of GDP of C\$965 million (US\$968 million) across the Canadian economy.

A copy of the 2013 IIPA Special 301 report is attached hereto as **Exhibit “F”**.

#### ***The BitTorrent Protocol***

9. The BitTorrent Protocol is a peer to peer (“P2P”) file sharing protocol that facilitates the distribution of large amounts of data over the internet through computer connected networks.

10. When a file is initially uploaded to a BitTorrent network, that is referred to as “seeding”. Other P2P networks users, called “peers”, can then connect to the user seeding the file in order to copy it.

11. The BitTorrent Protocol breaks a file into numerous small data packets, each of which is identifiable by a unique hash number created using a hash algorithm. Once a file has been broken into numerous packets, other network users or peers are able to download different sections of the same file from multiple users. Each new peer is directed to the most readily available packet of the file they wish to download. In other words, a peer does not copy a file

from one user, but from any peer who previously downloaded the file and has it available on the BitTorrent network, or, from any peer that is in active process of acquiring content while offering to redistribute the content during a session. The peer then becomes a seeder as it distributes the data packet to other peers connected to the BitTorrent network.

12. Once a packet is downloaded by a peer, that peer automatically becomes a download source for other peers connected to the BitTorrent network who are requesting the file. This speeds up the time it takes to download a file and frees up the capacity of a computer or server to simultaneously download and upload files. Unless the settings on the user's BitTorrent program are changed, every user who is copying or who has copied a file is simultaneously distributing it to every other user or peer connected to the BitTorrent network. This allows even small computers with low bandwidth to participate in large data transfers across a P2P network.

***TekSavvy is the Ideal Environment to Download Movies through the BitTorrent Protocol***

13. Teksavvy creates an environment that encourages its customers to download movies through the BitTorrent Protocol. On its website, Teksavvy advertises that a movie is 700mb, which it prominently displays beside each mention of the bandwidth cap for its various available plans. 700mb is a common size for torrents of full length movies. Using this 700mb file size, the Cable 150 plan section of Teksavvy's website advertises that you can download a full length movie in 1minute. A screen shot of the Cable 150 section of Teksavvy's website is attached hereto as **Exhibit "G"**.

14. Teksavvy offers a brief survey to help new customers pick an appropriate internet plan. Question 3 of the survey asks "How many full-length movies does your household download

each month?”. A copy of a screenshot of the “Find Your Plan” survey is attached hereto as **Exhibit “H”**.

15. Teksavvy calculates its customer’s bandwidth usage in a way that is beneficial to internet users that download large files, such as movies. For example, Teksavvy does not track download bandwidth between 2am and 8am. Additionally, Teksavvy does not count a customer’s upload bandwidth against their cap. This allows Teksavvy customers to schedule their downloads and uploads to hours where they won’t risk having to pay overage fees for going over their bandwidth cap. A screenshot of Teksavvy’s website is attached hereto as **Exhibit “I”**.

16. Teksavvy’s unlimited bandwidth cap is beneficial to, and attracts, customers that download and upload significant amounts of torrents off the internet. For example, in a thread on the forum of the website, DSLreports.com<sup>1</sup>, a TekSavvy representative (TSI Martin) writes:

I like the unlimited 2-8am download. You can pull 1TB and still be under the cap. If you change your habits and set-up a torrent scheduler, no one will need unlimited plans.

A copy of the thread is attached hereto as **Exhibit “J”**.

17. “Throttling” is a process put in place by some ISPs to reduce the speed of file sharing traffic. Teksavvy is opposed to this process and does not throttle file sharing traffic. Teksavvy helps advise its customers on how to avoid throttling by other ISP’s, such as Bell (who Teksavvy rents DSL service from). In a thread on the DSLReports forum, TSI Martin (a Teksavvy representative) explains the process for setting up MultiLink PPP (“MLPPP”), a service Teksavvy offers at a cost of \$4 per month for customers who wish to avoid Bell’s throttling. In a forum discussion involving TSI Martin, a user (AkFubar) states:

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<sup>1</sup> DSLreports.com is a website dedicated to ISP reviews, news and technology information.

Another question I've seen is effectiveness against the throttle. I think you might be avoiding putting this in and I can understand the reason(s) for that. Just a suggestion...

TSI Martin responds:

MLPPP didn't start as a way to not be throttled, this was a discovery made with it. The true purpose was to bond lines & as an added bonus throttling was bypassed.

A copy of the DSLReport thread is attached hereto as **Exhibit "K"**.

18. An example of a customer being referred to TSI Martin's MLPPP instructions can be found in the DSLReport thread created by user THRobinson. The user, discussing Teksavvy's anti-throttling fix, writes:

So basically, they [Teksavvy] don't throttle but they know Bell might...their fix is for me to spend more money on their service, for something that may or may not work, plus money on an extra modem....

A copy of the DSLReport thread is attached hereto as **Exhibit "L"**.

***TekSavvy Customers Openly Use TekSavvy to Download Films***

19. TekSavvy's website hosts a forum that allows its customers to communicate with each other, as well as with TekSavvy representatives. Forum discussions bear witness to Teksavvy's knowing facilitation of downloading activities from Torrent sites. For example, in a thread on Teksavvy's forum between a user, PanzerIV, and a Teksavvy representative, TSI-Liz, PanzerIV, on the issue of tracking his current internet consumption, states:

I've been downloading so much more, mostly with torrents since I switched from an unlimited but awefully [sic] slow 5Mbit ADSL.

TSI-Liz answers by telling him how he can track his bandwidth through the Teksavvy site. A copy of this thread is attached hereto as **Exhibit "M"**.

20. Similarly, a user named “admin” wrote as follows on the Teksavvy forum about his downloading speed when downloading from Torrent sites:

Well I jumped on the Teksavvy Bandwagon...happy,happy so far...speedtest.net results best so far ping 18ms 59.77 Mbps down... .99 up...averages 3+ Mbps on torrents. Hope the honeymoon never ends.

To which TSI-Keith of Teksavvy responded:

Glad to hear it’s going so well for you. We hope so too! Welcome aboard!

A copy of the thread from the Teksavvy forums is attached hereto as **Exhibit “N”**.

21. In another thread TSI-JonD of Teksavvy attempts to help a user troubleshoot a problem he is having with his BitTorrent connection. TSI-JonD writes:

... just wanted to check if this issue is happening with other torrenting programs. The reason I ask this is I am not too familiar with Bittorrent, but Utorrent allows you to select what ports your data transmits through. This program could be another option if you are not able to change the port in Bittorrent.

A copy of this thread from the Teksavvy forums is attached hereto as **Exhibit “O”**.

22. Another Teksavvy user, karmalized, wrote on Teksavvy’s Forum,

Am not sure if we are to talk about this here but I am wondering if users on these forums are familiar with techniques for bypassing internet monitoring like the folks voltage has hired...

This post is followed by replies from fellow Teksavvy users offering advice on how to avoid detection. A copy of this thread from Teksavvy’s Forum is attached hereto as **Exhibit “P”**.

*The Cost of Identifying Customers Based on IP addresses*

23. Between October 10, 2012 and December 14, 2012, I contacted employees of seven different ISPs to inquire about how they respond to and process Court Orders requiring ISPs to identify the contact information associated with specified IP addresses. Some of the individuals I spoke with and the respective ISPs they work for are as follows:

- 1) Shaw Cable Systems – Lyndsey Taylor (Security Co-Ordinator) and Garret Bastion (Security Manager);
- 2) Execulink – Jonathon Scott (Privacy Officer);
- 3) Cogeco – Mike Coltart (Manager, OSS, Security & CSG);
- 4) Eastlink Communications – Derrick Stennett (Manager, Corporate Security);
- 5) TekSavvy - Patrick Misur (TekSavvy's Information Technology Manager); and
- 6) ViaNet – Jody Heath.

24. All of the ISPs I contacted indicated they are familiar with such requests and will typically not respond to a request for identifying information without a Court order. Once presented with a Court Order, ISPs are equipped to quickly respond to requests to identify their subscribers using the assigned IP address and the specific date and time at which the copyright infringement or other relevant event occurred. All of the ISPs I contacted indicated that the specific date and time is important because IP addresses can be re-assigned. Knowing the relevant date, time of day, and time zone ensures that the correct customer is identified. All of this information is included in the data file that Canipre provides to ISPs in support of disclosure motions (and was included in this action).

25. Most ISPs have a dedicated employee or team of employees tasked with responding to such requests. The existence of these dedicated departments reflects the fact that requests to identify subscribers based on their IP addresses has become commonplace. Many ISPs recognize that this has now become part of doing business. For example, at the Legislative Committee on Bill C-32, on March 22, 2011, Bell Canada indicated that it has a dedicated "lawful access group" that reviews government requests for customer information. A copy of the transcript from the Legislative Committee on Bill C-32's meeting dated March 22, 2011 is attached hereto as **Exhibit "Q"**.

26. Government agencies regularly request subscriber information from Telecommunication Service Providers ("TSPs"), which include internet, cable, phone, and cell phone providers. In 2011, there were approximately 1.2 million requests for customer information made by government agencies in 2011. Between 2012 and 2013 the Canadian Border Services Agency ("CBSA") submitted 18,849 requests for customer information to TSPs. The CBSA indicated that a request for basic subscriber information was typically fulfilled in 2-3 business days. A copy of a Toronto Star article on the Government's requests is attached hereto as **Exhibit "R"**. A copy of the CBSA's disclosure in response to an Order of the House of Commons is attached hereto as **Exhibit "S"**.

27. Canadian ISPs have also been participating in voluntary notice and notice systems for over a decade. A notice and notice system involves a rights holder sending a notice of alleged copyright infringement, usually identified by an IP address, to an ISP. The ISP agrees to forward the notice to the customer assigned to that IP address at the relevant time. For example, in 2010 Rogers passed on 207,000 notices from rights holders to Rogers customers. In the same year,

Bell estimated that it received 1,000,000 requests. A copy of a transcript from the Legislative Committee on Bill C-32's meeting dated March 22, 2011 is attached hereto as **Exhibit "Q"**.

28. *The Copyright Modernization Act* S.C. 2012, c. 20, which received Royal Assent on June 29, 2012, codified the voluntary notice and notice system. ISPs, such as TekSavvy, were aware that once the notice and notice provisions were enacted they would be required to process and forward copyright infringement notices on to their customers. Failure to abide by the new system could result in fines between \$5,000-\$10,000. Under this mandatory notice and notice system, ISPs will not be able to charge rights holders a fee for processing their request. A copy of the notice and notice provisions to be implemented is attached hereto as **Exhibit "T"**.

### *The Process*

29. Based on my investigations, which included numerous conversations with employees of ISPs, I was advised that it is a simple process for ISPs to correlate an IP address with a subscriber's contact information and that this information is readily available. This is true whether or not the subscriber maintains the same IP address over a long period of time, which is known as a "static" IP address, or whether the subscriber's IP address changes with relative frequency, which is known as a "dynamic" IP address. In either scenario, the ISP only requires the IP address and the precise date, time of day, and time zone of the infringement, known as a "time stamp" in Canipre's evidence files, to determine which of its subscribers was assigned the IP address at the precise time set out in the time stamp.

30. All of the ISPs I spoke with indicated that they currently have a process in place to correlate IP addresses with subscriber information.

31. I was advised by Garrett Bastion, of Shaw Cable Systems, of the typical process an ISP undergoes to reconcile an IP address with subscriber information. ISPs keep a data bank in which IP address assignments are archived and stored. These are usually kept for a minimum period of 6 months. Once provided with the IP addresses, the ISP will input the IP addresses and the associated time stamp into its data bank to determine who the IP address was assigned to at the time set out the “time stamp”. This retrieval process is quick and easy.

32. There are some circumstances in which an ISP will not be able to identify the subscriber associated with an IP address. This occurs if: (a) the ISP no longer has the data (because more than 12 months has passed); or (b) if the request is for an IP address that the ISP has “resold” to another provider. In the latter scenario, the ISP which purchased the bloc of IP addresses would need to provide that information. For example, I have been informed by Patrick Misur of TekSavvy that their cable network internet services are provided by third parties and, therefore, TekSavvy does not have any IP address data for their cable internet subscribers.

***Correlating an IP Address is Not Costly***

33. The process to identify the subscriber associated with an IP address is not time consuming or costly. I was advised by Jody Heath, of ViaNet, that for each IP address the process takes minutes and there are no “processing costs” to speak of, other than an employee’s time. For a handful of IP address, most ISP’s do not even require payment of a fee as the time commitment is negligible. For example, I am advised by Greg Moore, a Montreal lawyer retained by Voltage Pictures LLC to identify the IP addresses of certain illegal downloaders in Montreal, that in his dealings with several ISP’s in Quebec, none of the ISP’s required a fee for providing the contact information for the specified IP addresses, and said contact information

was in each case quickly provided. The ISP's that Mr. Moore dealt with were 3 Web Corp., Access Communications Co-Operative Ltd., CAN Inc., and Distributel Communications. In each case, the required information was provided without charge. The Orders that the ISP's were responding to in those instances are attached hereto as **Exhibit "U"**.

34. Of course, there may be some greater costs involved as the number of IP addresses increases. However, these costs would simply be the additional time that a dedicated employee would have to spend. For example, the CBSA has stated that it spent \$24,211.00 on the 18,849 requests it submitted between 2012 to 2013. This averages at just over \$1 per request. Requests typically cost between \$1 and \$3. Requests that were authorized by a judge were not paid for.

***Correlating an IP Address with Contact Information is Not Time Consuming***

35. The process to correlate an IP address with a subscriber's contact information is not time consuming. While there is some variety, it generally takes about a minute to process a single query.

36. I am advised by John Philpott, one of the lawyers for Voltage Pictures LLC, and verily believe that four days passed from the time that TekSavvy received Voltage's 2,114 IP addresses and the date on which those addresses were processed. It may be that TekSavvy was in fact able to process the IP addresses much faster, potentially in less than an hour.

37. TekSavvy was able to process 2,114 IP addresses in four business days or, put another way, over 500 per day. Assuming a regular 8 hour workday, this computes to processing about

66 IP addresses every hour or just over 1 IP address every minute<sup>2</sup>. This further assumes that it actually took four business days to process, when it may have been much faster.

38. Based on my investigations, I have ascertained that technicians tasked with responding to Court Orders requiring ISP's to identify IP addresses receive annual salaries of between \$35,000 and \$45,000. Assuming an employee is required to work full time for four days correlating IP addresses to customer information, the cost of that time to the ISP is between \$538.44 and \$692.32 respectively<sup>3</sup>

***TekSavvy Uses the Rule 238 Motion to Bolster its Public Image***

39. In or around December 5, 2012, less than 1 month after Voltage commenced its claim, Teksavvy added a "Copyright Law in Canada" section to its website. This section features Teksavvy's position on Copyright Law with statements such as, "We have always fought for our customers' rights and we take their privacy seriously" and "TekSavvy will do everything in its power to protect its customers." A copy of this page of Teksavvy's website is attached hereto as **Exhibit "V"**.

40. Teksavvy's "Copyright Law in Canada" page provides a link to a list of frequently asked questions about Voltage's motion. The first question on that list is "What is TekSavvy doing to protect its customers' personal information?". The answer provided by Teksavvy states:

TekSavvy will not provide personal information to a 3<sup>rd</sup> party when copyright infringement is alleged unless ordered to do so by a court. TekSavvy will do its

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<sup>2</sup> 2114 IP addresses divided by 4 days is 528.5. 528 IP addresses per day divided by 8 hours in a work day is 66 IP addresses per hour. 66 IP addresses per hour divided by 60 minutes in an hour is 1.1 IP addresses a minute

<sup>3</sup> \$35,000/year divided by 52 weeks in a year is \$673.08 per week. \$673.08 divided by 5 work days in a week is \$134.61 per day. 4 days of correlating IP addresses at \$134.61 per day is \$538.44. \$45,000/year divided by 52 weeks in a year is \$865.38 per week. \$865.38 divided by 5 work days in a week is \$173.08 per day. 4 days of correlating IP addresses at \$173.08 per day is \$692.32.

best to ensure that its customers receive notice when disclosure of their personal information is sought in such cases.

The last question asks “Is TekSavvy fighting this motion in a court of law?” to which TekSavvy answers with the following:

No. The claims are not against us. It is up to those identified by Voltage to seek legal advice or take action.

A copy of the Copyright FAQs page of TekSavvy’s website is attached hereto as **Exhibit “W”**.

41. TekSavvy also maintains a page documenting the entire proceedings associated with Voltage’s herein motion. This page includes all materials filed with the court and transcripts from the June 25<sup>th</sup>, 2013 hearing. A copy of this page is attached hereto as **Exhibit “X”**.

42. On December 10, 2012 Teksavvy released a press release regarding Voltage’s motion. The press release states,

TekSavvy believes in transparency and that customers have the right to privacy, and to know that their information is being requested from an outside source. TekSavvy has therefore insisted that Voltage give it the opportunity to advise affected customers of Voltage’s motion.

A copy of this press release is attached hereto as **Exhibit “Y”**.

43. A December 18, 2012 Teksavvy issued another press release quoting TekSavvy CEO Marc Gaudrault (“Gaudrault”):

We did not feel that giving out private customer information without prior notice was right, so we took action. We also did not feel that adequate notice was given to our customers to allow them to react, which is why we requested an adjournment.

A copy of this press release is attached hereto as **Exhibit “Z”**.

44. Gaudrault also made several posts on TekSavvy's online blog about the motion. Gaudrault's December 10, 2012 post critiques Voltage's motion stating "we are frankly puzzled by the approach that Voltage has taken. It seems contrary to the government's intent with copyright reform, which was to discourage file sharing lawsuits against individuals, while still protecting copyright holders' rights". He continues on to write:

Teksavvy wants to protect its customers' privacy rights and rights to be notified of lawsuits that could affect them. At the same time, we must abide by the legal process. Through all of this you can be sure of our commitment to our customers. We will: 1) Continue to be as transparent as possible, and inform you when developments happen. 2) Notify you as soon as possible should we receive a request for customer personal information. 3) We will not provide your personal information to any third parties unless required by a court order.

The comments section of the blog posts contains numerous examples of customers praising TekSavvy for its efforts. For example one user named Ryan wrote:

What a crazy situation..Every time I read an article like this, I am glad I made the switch to TekSavvy, a company that actually cares about its customers, not just their money.

Another user named Chris Bogdon wrote:

Thanks for keeping us in the loop. Much appreciated.

A user named Mike Empey wrote:

Love the transparency and openness. Thanks for keeping us updated and informed. Such a stark contrast to Rogers/Bell.

A copy of this blog post and the comments section is attached hereto as **Exhibit "AA"**.

45. In a blog post on February 21, 2014 Gaudrault once again commented on the Voltage motion. Gaudrault wrote,

We are very proud to have played a role in increasing the protection of consumers, their privacy and discouraging copyright trolling. We will continue to have a role in the Court proceedings in order to ensure our customer's rights are protected and that the laws are followed as per the Court Order. You can be confident that we won't release any customer information until all the conditions of the Court are met.

In the comment section a user named Charles Smith wrote:

We all thank you for the time and money you have spent on this, This is why you are the best ISP to deal with, you care about your customers!

Another user named Jo, wrote:

And ANOTHER reason for me to keep referring and push my friend to become your customer. Thx for your time and money invested in this fight for us. It's a good deed that will pay for itself over time as it won't go unnoticed!

A copy of this blog post and the comment section is attached hereto as **Exhibit "BB"**.

46. In a May 2014 thread on the DSLReport forum a user named MaynardKrebs addressed a post to TSIMarc which is Gaudrault's account on the forum. MaynardKrebs wrote:

@TSIMarc Congrats on the honour of being named the most transparent & forthright ISP in the land. Teksavvy truly is a beacon of light in the dark world we find ourselves plunging into these days.

A copy of this thread is attached hereto as **Exhibit "CC"**.

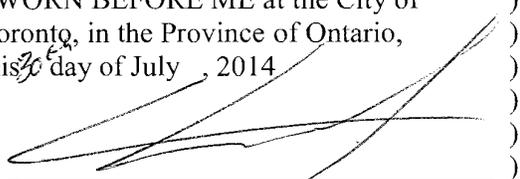
47. On December 11, 2012, in a DSLReport Forum discussion about TekSavvy's log retention policy Gaudrault wrote "prior to this, we were planning on extending the retention to 6 months. Obviously that won't happen now or at least not without further contemplating these events". Gaudrault in this post is referring to limitations Teksavvy will place on its retention policies to frustrate rightsholders seeking the identity of Teksavvy customers who engage in illegal downloading. A copy of this post is attached hereto as **Exhibit "DD"**.

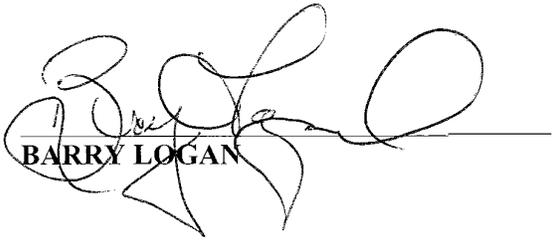
48. On December 14, 2012 Gaudrault started a thread on the DSLReport Forums titled "Discussion about log retention". In this thread Gaudrault sought feedback on what customers thought about TekSavvy's IP address log retention policy. Gaudrault wrote,

Currently it is our policy to keep log files for 90 days. After that they are deleted. Leading up to this, we were planning on extending that to 6 months. Now, though, we are asking ourselves, what is the right length of time to retain logs? This request for information by Voltage has us carefully considering all aspects of this question and I think it's a good discussion to have

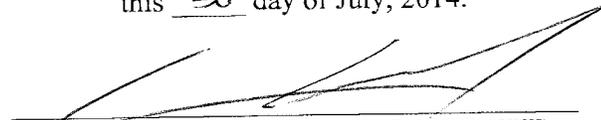
A copy of this post is attached hereto as **Exhibit "EE"**.

49. I have sworn this affidavit in support of Voltage's motion and for no improper purpose.

SWORN BEFORE ME at the City of  
Toronto, in the Province of Ontario,  
this 20<sup>th</sup> day of July, 2014  
  
\_\_\_\_\_  
A Commissioner of Oaths, etc.

  
\_\_\_\_\_  
**BARRY LOGAN**

This is **Exhibit "U"** referred to in the  
affidavit of **Barry Logan**, sworn before me  
this 30<sup>th</sup> day of July, 2014.



A COMMISSIONER FOR TAKING AFFIDAVITS

**JUDGMENT**

Further to the analysis undertaken, **the Court orders that:**

1. Voltage Pictures LLC proceed with a written examination for discovery of Bell Canada, Cogeco Cable Inc. and Videotron GP in order to obtain the names and addresses related to their customer accounts associated with the IP addresses at the times specified in Annex A attached to the Notice of Motion.
2. Within two weeks, Bell Canada, Cogeco Cable Inc. and Videotron GP disclose to Voltage Pictures LLC the names and addresses related to their customer accounts associated with the IP addresses at the times specified in Annex A. This disclosure shall be in Microsoft Excel format, with publishing rights, encrypted on a compact disk or any other electronic medium.
3. Voltage Pictures LLC reimburse any reasonable expenses incurred by Bell Canada, Cogeco Cable Inc. and Videotron GP in collecting the personal information identified in paragraph 1 of this order.
4. Without costs.

\_\_\_\_\_  
"Michel M.J. Shore"

Judge

Certified true translator  
Susan Deichert, LLB

Court File No. T-2058-12

## FEDERAL COURT

BETWEEN:

VOLTAGE PICTURES LLC

Plaintiff

and

JOHN DOE and JANE DOE

Defendants

## AFFIDAVIT OF STEVEN ROGERS

(Sworn on July 31, 2014)

I, STEVEN ROGERS, of the City of London, in the province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the founder and principal of Digital Evidence International, Inc. ("DEI"), an Ontario based corporation that provides internet investigation services and computer forensic analysis. Prior to founding DEI, I was a member of the Royal Canadian Mounted Police, having served twenty-four (24) years in total, with my last six (6) years being in charge of the tech crime section for Ontario. During my career with the RCMP, and since my retirement, I conducted and managed hundreds of internet investigations, and examined, or have been involved in, the collection and examination of thousands of piece of electromagnetic storage media. A copy of my curriculum vitae is attached to Exhibit "A" below.

2. On July 22, 2014, I was contacted by James Zibarras, a partner at Brauti Thorning Zibarras LLP. The purpose of the conversation was to confirm my retainer to act for Voltage

Picture LLC as an expert on internet investigations and computer forensic services in a copyright infringement case.

3. On July 30, 2014, I completed my expert report. A copy of my expert report is attached hereto as **Exhibit "A"**.

4. A copy of my Certificate Concerning the Code of Conduct for Expert Witnesses in the Federal Court of Canada is attached hereto as **Exhibit "B"**.

SWORN BEFORE ME at <sup>Kentville</sup> the City of )  
London, in the Province of ~~Ontario~~, <sup>Nova Scotia</sup> )  
this 31 day of July, 2014 )  
 )  
A Commissioner of Oaths, etc. )

  
\_\_\_\_\_  
STEVEN ROGERS

**DALEEN VAN DYK**  
A Notary Public in and for  
The Province of Nova Scotia

This is **Exhibit "A"** referred to in the  
affidavit of **Steven Rogers**, sworn before me  
this 31 day of July, 2014.



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*A COMMISSIONER FOR TAKING AFFIDAVITS*

**DALEEN VAN DYK**

A Notary Public in and for  
The Province of Nova Scotia



**Expert Report of Steven L. Rogers**

**In**

**Voltage Pictures LLC, Plaintiff**

**vs.**

**TekSavvy Solutions Inc., Defendant**

***Retention***

1. Digital Evidence International Inc. (“DEI”) has been retained by counsel for Voltage Pictures LLC (the “Plaintiff”) to provide analysis, insight and opinion on the process and procedures undertaken by TekSavvy Solutions Inc. (the “Defendant”), in fulfilling its requirements to provide subscriber information to the Plaintiff. DEI was advised by counsel for the Plaintiff that the Defendant was required by order of the court to produce subscriber information related to certain IP addresses during certain time periods.
2. The opinions presented are not legal opinions and to the extent that additional or updated information is made available for review and that such additional or updated information impacts my findings my report may be updated.

***Compensation***

3. DEI bills fees and expenses in this matter based on an hourly rate and expenses incurred. The hourly rate for DEI personnel with regard to this engagement is the usual and ordinary rate in effect at the time the report is prepared. No portion of DEI’s compensation is dependent upon my conclusions or the outcome of this matter. Neither the amount of DEI’s compensation nor its hourly billing rate depends on whether I am obligated to testify at discovery or trial.

***Data and Other Information Considered***

4. In arriving at my opinion in this case I have considered a number of different sources of information that are identified below and in the attached exhibits. The primary documents and sources of data that I reviewed for the preparation of this report are:
  - a. The affidavit of Marc Gaudrault sworn June 27, 2014 (the “Gaudrault Affidavit”)
  - b. The affidavit of Pascal Tellier sworn June 27, 2014 (the “Tellier Affidavit”);
  - c. The affidavit of Pierre Aube, unsworn (the “Aube Affidavit”);

- d. A blog post by Jason Koblovsky titled “The Price For Internet Providers To Look The Other Way On Privacy” (the “Koblovsky Post”);
- e. The website <http://wikipedia.com>; (the “Wikipedia Web Site”);
- f. The website <http://merriam-webster.com> (the “Merriam Webster Website”);
- g. The website <http://whatismyipaddress.com> (the “What Is MyIP Address Web Site” and collectively the “Information Considered”); and
- h. The website <http://deepsoftware.com> (the “Deep Software Web Site”)

### ***Background and Qualifications***

- 5. I am the President of DEI and have been involved in computer forensic examinations and Internet investigations since 1995. I have been involved in the collection and examination of thousands of pieces of electromagnetic storage media and have conducted or managed hundreds of Internet investigations.
- 6. I was a member of the Royal Canadian Mounted Police (“RCMP”) for 24 years serving my last 6 years in charge of the tech crime section for Ontario. As part of my day to day responsibilities I was tasked with overseeing and / or conducting the forensic examination of all forms of electro-magnetic storage devices including but not necessarily limited to work stations, laptops, CD’s, Jazz discs, Bernouli discs, file servers, email servers, floppy diskettes, USB devices and hand held devices such as Palm Pilots and cell phones. The forensic analysis of these devices included an array of file systems such as FAT 12, FAT 16, FAT 32, HFS, NTFS, ext2 and HFSPPlus. Additionally, my work involved the forensic analysis of various operating systems including Apple MacIntosh, Linux, DOS, Novell and Microsoft Windows. My service with the RCMP Tech Crime section also involved providing assistance to our client detachments and partner police service agencies.

7. Under my stewardship the RCMP Tech Crime section also implemented a mentoring program where we invited our police partners into our forensics lab for the purpose of being mentored by my team of forensic examiners. I participated in the day to day training of these police partners with the objective of providing them with enough skill and knowledge to return to their own department and create and run their own computer forensics lab.
8. Immediately after retiring from the RCMP I worked for H&A Forensic and Investigative Accounting (as it then was) as the National Director, Computer Forensics and E-Discovery. I implemented all policies and procedures for the computer forensics lab and procured all hardware and software.
9. In August, 2003 I founded DEI. DEI has been providing computer forensic acquisitions and analysis and Internet investigation services since its inception. Through the development of its own proprietary methodologies of archiving Internet content, DEI has been able to secure and maintain the continuity of publicly available information for use in evidence.
10. I have participated in the execution of approximately sixty-five Anton Piller Orders (“APO’s”) for the purpose of, among other things, anti-piracy investigations, theft of intellectual property and fraud. The data collected in the majority of these cases has been forensically acquired and analyzed by DEI and is used as a database of intelligence for current and future investigations. DEI also receives data from its clients where such data has been acquired through judicially authorized search warrants executed in the United States or where data has been voluntarily surrendered to our clients in Canada and the United States and then forwarded to DEI for forensic analysis and migration to DEI’s proprietary database.
11. I have also participated in a number of regulatory actions assisting the Ontario Securities Commission (the “OSC”) with the identification, preservation and collection of electronic evidence as well as conducting forensic analysis of data and production of affidavits and expert witness reports.

12. I am a certified EnCase Forensic Examiner, an A+ Certified Professional and a Certified Novell Administrator (4.11). Attached as Schedule 1 is a copy of my CV.

### ***Testimony***

13. I have testified at many criminal matters during my career with the Royal Canadian Mounted Police including but may not be limited to: break and enter, assault, assault causing bodily harm, murder, impaired driving, criminal negligence causing death, drug offences, proceeds of crime and fraud.
14. In addition to giving evidence in criminal proceedings I have provided expert reports and affidavit evidence on a number of occasions in civil matters and I have given viva voce evidence at discovery, deposition and trial. To the best of my knowledge the matters for which I have provided expert reports or affidavit evidence and those matters for which I can recall giving viva voce evidence have been listed in my CV.

### **SUMMARY OF FINDINGS**

15. I have conducted a review of the Information Considered and have come to the following preliminary conclusions that are subject to change should further information be obtained that would impact my conclusions:
  - a. The length of time the Defendant required to complete the IP address to customer information correlation is not clearly identified;
  - b. The human resources dispatched by the Defendant to complete the IP address to customer information correlation is not clearly identified; and
  - c. The process to complete the IP address to customer information correlation, as specified by the Defendant, is not clearly defined.

## **DETAILED ANALYSIS**

### ***Overview***

16. On July 10, 2014 I was contacted by counsel for the Plaintiff who was requesting assistance understanding the process undertaken by the Defendants to fulfill its judicial obligation to provide the Plaintiff with subscriber information and to understand the reasonable length of time and human resources required to complete this process. I was retained on July 22, 2014 to prepare an expert report on the process and procedures undertaken by the Defendant to provide IP address to subscriber information correlation as ordered by Prothonotary Aalto. I submit this report to provide assistance to the court with a basic understanding of networks, database structures and a process by which companies may query their database to return results that otherwise may not be available. For clarity with the court, I am not an internet service provider and I have not specifically worked with RADIUS log files.

17. Mr. Gaudrault has stated that an Internet Protocol (“IP”) address is assigned to a device such as a computer, server or printer that is connected to the internet<sup>1</sup>. He goes on to state that IP addresses are not assigned to a single device on a permanent basis and in deed, IP addresses are not assigned to a subscriber but instead to a device<sup>2</sup>. Additionally, Mr. Gaudrault states that the only personal contact information that the Defendant has is with respect to the person who subscribes to TekSavvy’s service for the internet access associated with that device<sup>3</sup>.

18. These statements are not completely accurate and may not be sufficient to enable the court to draw conclusions. I offer a further explanation of how the internet network functions and how an IP addresses is utilized.

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<sup>1</sup> The Gaudrault Affidavit, paragraph 6

<sup>2</sup> The Gaudrault Affidavit, paragraph 7

<sup>3</sup> The Gaudrault Affidavit, paragraph 7

## ***IP Addresses***

19. The internet is a network of inter-connected private and public networks<sup>4</sup> where, as an example, a company or an individual can have its own private network<sup>5</sup> that is accessible to only those users who have been authorized to access the network resources and who have been assigned a private IP addresses. These private IP addresses can be dynamically assigned to network resources (computers, printers, laptops, smart phones etc) or permanently assigned as static IP addresses according to the network administrator's configuration of the network<sup>6</sup>.
  
20. At the same time as the company or individual has access restricted to their own private network they may also be able to access resources on the public internet network, such as searching <http://www.Google.com> or browsing the Wikipedia Web Site. To gain access to the public internet network the company or individual must subscribe to a service offered by various internet services providers ("ISP"), such as TekSavvy, who will 'lease' to the company or individual an IP address which may be dynamically assigned (could periodically change) or it may be static (the IP address won't change)<sup>7</sup>.
  
21. To implement the internet service the ISP requires knowledge of the service address (where the IP address will demark) and the subscriber (who is paying the bill). When the internet service is implemented a piece of hardware (a "modem")<sup>8</sup> will be placed somewhere in the subscribers premises (such as the basement, or in the computer server room). The modem has a unique identifier that the ISP will associate with the service location and the subscriber so the ISP can recover their modem, should they need to, and to ensure they can collect on the fees owing. The IP address will then be 'delivered' to the modem. The customer will connect the modem to their computer or to more hardware that will allow all of their internal private network resources (such as a laptop, a smart phone, a work station etc) to share the single IP address 'leased' from the ISP giving everyone access to

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<sup>4</sup> Appendix A, the Merriam Webster Web Site, definition of the internet

<sup>5</sup> Appendix B, the Wikipedia Web Site, private network

<sup>6</sup> Appendix C, the What Is My IP Address Web Site, explanation of dynamic and static IP addresses

<sup>7</sup> Appendix C, page 1

public internet network resources. The ISP will then invoice the subscriber, typically on a monthly basis, for the lease of the IP address and possibly a fee for rental of the modem.

### **The Request**

22. In the matter before the court there are 2,114 IP addresses that have been identified on the public internet network as allegedly offending the Plaintiffs copyright for which the Plaintiff has requested subscriber information from TekSavvy. Mr. Gaudrault has stated that “TakSavvy maintains, for a short period of time, logs that indicate what IP addresses are associated with particular customer accounts at what times”<sup>9</sup> but Mr. Gaudrault does not define “a short period of time”. Mr. Gaudrault goes on to state that they do not frequently obtain requests for “...disclosure of subscriber information associated with IP addresses”<sup>10</sup> having received 52 such requests (to not include the request from Voltage) throughout 2012 and 2013. All such requests were received from law enforcement. This frequency of requests is, approximately, one every two weeks for a 24 month period. Of the 52 requests Mr. Gaudrault discloses that TekSavvy complied with 17 of the requests and denied the remaining 35<sup>11</sup> (no explanation provided).

23. In addressing the request from the Plaintiff to supply subscriber information correlated to an IP address, Mr. Gaudrault describes it as “unique in Canada”<sup>12</sup> since the request originated from a private company and not law enforcement. He does not state that the process to produce the results for the Plaintiff is different than the process to produce the results for law enforcement leaving me to conclude that their process is the same. If their process is the same, TekSavvy experienced the request to associate IP addresses with subscribers approximately 24 times prior to undertaking the request from the Plaintiff and completed the process, at most, 17 times:

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<sup>8</sup> Appendix D, the Merriam Webster Web Site, definition of a modem

<sup>9</sup> The Gaudrault Affidavit, paragraph 8

<sup>10</sup> The Gaudrault Affidavit, paragraph 9

24. According to the time line provided by Mr. Gaudrault, TekSavvy completed the IP address to subscriber information correlation between November 14, 2012 and December 4, 2012, a period of 15 business days.

### **The Process**

25. Mr. Gaudrault explains that the process to correlate the 2,114 IP addresses provided by Voltage to a customer account of TekSavvy was neither simple nor customary<sup>13</sup>. He explains that the unusual nature of this request, notwithstanding they had experienced similar requests for smaller volumes on approximately 24 prior occasions, required the involvement of many individuals, including senior officers of TekSavvy<sup>14</sup>:

26. My research indicates requests to provide IP address to subscriber information correlation appears to be quite customary. In a recent news article Michael Geist, Toronto Star<sup>15</sup>, states

“...the number of government requests for subscriber information has been staggering, most of which occur without court oversight.” and continued

“A 2011 document supplied to the Privacy Commissioner of Canada advised of 1.2 million requests for subscriber information affecting roughly 750,000 account holders. While that revelation garnered media headlines across the country, a little-noticed 2013 document from Public Safety Canada released under the Access to Information Act indicates that in excess of a million requests annually has been standard for years.”

“The document states that ITAC members (the Information Technology Association of Canada that counts major telecom providers among its members) “handled 1,130,000 basic subscriber information requests annually from 2006 to 2008.”

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<sup>11</sup> The Gaudrault Affidavit, paragraph 9

<sup>12</sup> The Gaudrault Affidavit, paragraph 10

<sup>13</sup> The Gaudrault Affidavit, paragraph 19

<sup>14</sup> The Gaudrault Affidavit, paragraph 19

<sup>15</sup>[http://www.thestar.com/business/tech\\_news/2014/07/18/how\\_will\\_ottawa\\_respond\\_to\\_courts\\_reshaping\\_of\\_privacy\\_law\\_geist.html](http://www.thestar.com/business/tech_news/2014/07/18/how_will_ottawa_respond_to_courts_reshaping_of_privacy_law_geist.html)

27. Obtaining IP address to subscriber information correlation has also been a common practice in other copyright matters in which I have been involved.
28. To explain their process, the Gaudrault Affidavit provides eight (8) steps<sup>16</sup> undertaken by the Defendants to complete the request. No times, number of employees or employee positions are associated with any of the activities, just a summary<sup>17</sup>. The first issue that the court would need to understand is the purpose of the RADIUS logs.
29. RADIUS, or “Remote Authentication Dial In User Service (RADIUS) is a networking protocol that provides centralized Authentication, Authorization, and Accounting (AAA) management for users that connect and use a network service. RADIUS was developed by Livingston Enterprises, Inc. in 1991 as an access server authentication and accounting protocol and later brought into the Internet Engineering Task Force (IETF) standards. Because of the broad support and the ubiquitous nature of the RADIUS protocol, it is often used by ISPs and enterprises to manage access to the Internet or internal networks, wireless networks, and integrated e-mail services. These networks may incorporate modems, DSL, access points, VPNs, network ports, web servers, etc.”<sup>18</sup> The RADIUS logs are the output generated by the Network Policy Server (“NPS”) or Internet Authentication Service (“IAS”)<sup>19</sup>
30. To assist the court with understanding the Defendant’s process I will list the eight (8) steps identified in the Gaudrault Affidavit and provide additional comments on each:
- a. Initial analysis of the request:
    - i. The request to provide IP addresses to subscriber information is not a complex request and I respectfully submit that there is very little ‘analysis’ that is required. Such analysis would include:

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<sup>16</sup> The Gaudrault Affidavit, paragraph 20

<sup>17</sup> The Gaudrault Affidavit, Appendix A

<sup>18</sup> The Wikipedia Web Site, <http://en.wikipedia.org/wiki/RADIUS>

identify the sources of data, identify the required resources, complete the task. Somewhat over simplified, but not much more complex than this.

Estimated time: 2 hours.

Estimated human resources: management, supervisor, administrator;

b. Project management and operational planning:

- i. Since TekSavvy had prior experience with requests of a similar nature, just not the volume, the previous processes that must have been implemented would need to be adjusted to account for the increase in volume but otherwise, should not have been different.

Estimated time to manage and plan 1 hour.

Estimated human resources: one manager and one administrator.

c. Locating, transferring and decompressing raw daily RADIUS log files from TekSavvy's backups:

- i. I have no knowledge of how TekSavvy stores their backup data or the life cycle of their backups but it is normal business practice to have a rigid, documented and structured backup cycle that includes known storage locations for the data therefore locating the data would be a straight forward task. Given my understanding that the 2,114 subscribers are recent customers (previous 90 days), it is reasonable to believe that the data was 'close at hand'.

Estimated Time to locate: 1 hr

Estimated human resources: one junior administrator;

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<sup>19</sup> Appendix E, the Microsoft Web Site, Interpret IAS Format log Files

- ii. Transferring the RADIUS logs, I would expect, refers to the collection of the data from one or more backup storage devices onto another device / hard drive for the purpose of working with the data in its raw form. The time to collect this data is predominantly machine time and the speed by which it is collected is limited by the volume of data being copied and the method by which the copy is completed (i.e. USB 2, ,USB 3, eSATA, direct connect SATA, IDE). There is no indication of the number or size of the log files that required transferring.

Estimated time: It is not possible for me to estimate the time to complete the copy without additional information but as previously indicated, most of this time is machine time.

Estimated human resources: one junior administrator.

- iii. Decompressing the data is the process of extracting the RADIUS log files from a compressed archive to their normal uncompressed or raw state so that the data can be further processed. The RADIUS logs, in raw form, would contain data similar to the following screen shot<sup>20</sup>. For ease of reference, the subscriber and the subscribers IP address are highlighted in yellow:



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example log [2]
1 192.168.0.1:FT-GIEngineer,10/03/2001,22:43:46,RAS,SHUTTLE,6,2,7,1,5,7,61,0,77,0x0D0A434F4E4E45435420338343030D0A,4100,192.168.0.1,0.,4147,311,4149,MSRASV5.00,4129,FT-GIEngineer,25,311 1 192.168.0.
2 192.168.0.1:FT-GIEngineer,10/03/2001,22:43:46,RAS,SHUTTLE,25,311 1 192.168.0.1 10/03/2001 06:46:58 5,4130,pgsdomain/Users/GIEngineer,6,2,7,1,4149,Allow access if dial-in permission is enabled,4127,3.
3 192.168.0.1:FT-GIEngineer,10/03/2001,22:43:49,RAS,SHUTTLE,6,2,7,1,5,7,61,0,77,0x0D0A434F4E4E45435420338343030D0A,25,311 1 192.168.0.1 10/03/2001 06:46:58 5,44,10,6,192.168.0.244,12,1500,13,1,50,1#
4 192.168.0.1:FT-GIEngineer,10/03/2001,23:00:46,RAS,SHUTTLE,6,2,7,1,5,7,61,0,77,0x0D0A434F4E4E45435420338343030D0A,25,311 1 192.168.0.1 10/03/2001 06:46:58 5,44,10,6,192.168.0.244,12,1500,13,1,50,1#

```

Estimated time to decompress: This is machine time but generally would require a human to intervene only to open the archive and extract the RADIUS log. I have no knowledge of the number of RADIUS logs that required decompressing or the technology that was implemented to initially compress the RADIUS log files

<sup>20</sup> The Deep Software Web Site

therefore the amount of time required human for intervention is difficult to estimate but a reasonable time would be 2 hours.

Estimated human resources: one junior administrator

- d. Setting up, designing, and programming a new SQL server to be used to automate and run the searches; and then setting up, programming, and constantly running an import script to import these data files into SQL server:

- i. Setting up, designing, and programming a new SQL server, for a system administrator, is not a difficult task.

Estimated time: 5 hours to build out a complete new SQL server otherwise, 30 minutes to create a new, empty database on a non-production, test SQL Server to import the RADIUS logs.

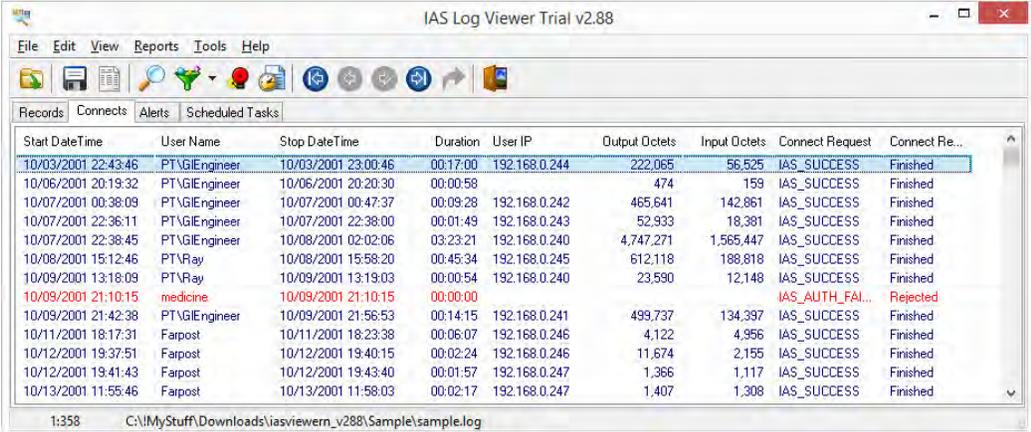
Estimated human resources: one senior or one junior administrator.

- ii. Setting up, programming, and constantly running an import script to import the RADIUS log files into SQL server is also not a complicated task for a qualified programmer. The statement “constantly running an import script to import these data files...” indicates that a human must run an import script for every uncompressed RADIUS log file. If I am understanding the statement correctly it does not sound reasonable since the script can automatically loop thru all the uncompressed RADIUS log files unattended and simply report when it is done.
- iii. As an alternative to setting up a new SQL database, the Defendant could also have used an IAS Log Viewer<sup>21</sup> (the “IAS Log Viewer”). I do not have personal experience with this software but I have personal experience with similar software parsing large data

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<sup>21</sup> Appendix F, the Deep Software Web Site, IAS Log Viewer overview

sets. My research indicates the IAS Log Viewer could have provided the Defendant with functionality to extract the required data without having to build a new SQL server and import the raw RADIUS logs<sup>22</sup>. The following screen shot provided by the Deep Software Web Site shows the RADIUS log file after it has been parsed into the IAS Log Viewer. The ‘user name’ column is the ISP subscriber, the ‘user IP’ is the IP address that was being used by the subscriber and the ‘start date time’ and ‘stop date time’ columns provide the time frame the subscriber used the ‘user IP’.



The screenshot shows the IAS Log Viewer interface with a table of log entries. The table has the following columns: Start DateTime, User Name, Stop DateTime, Duration, User IP, Output Octets, Input Octets, Connect Request, and Connect Re... (likely Connect Result). The data includes entries for various users like PT\GIEngineer, PT\VRay, medicine, and Farpost, with their respective connection times, durations, and IP addresses.

Start DateTime	User Name	Stop DateTime	Duration	User IP	Output Octets	Input Octets	Connect Request	Connect Re...
10/03/2001 22:43:46	PT\GIEngineer	10/03/2001 23:00:46	00:17:00	192.168.0.244	222,065	56,525	IAS_SUCCESS	Finished
10/06/2001 20:19:32	PT\GIEngineer	10/06/2001 20:20:30	00:00:58		474	159	IAS_SUCCESS	Finished
10/07/2001 00:38:09	PT\GIEngineer	10/07/2001 00:47:37	00:09:28	192.168.0.242	465,641	142,861	IAS_SUCCESS	Finished
10/07/2001 22:36:11	PT\GIEngineer	10/07/2001 22:38:00	00:01:49	192.168.0.243	52,933	18,381	IAS_SUCCESS	Finished
10/07/2001 22:38:45	PT\GIEngineer	10/08/2001 02:02:06	03:23:21	192.168.0.240	4,747,271	1,565,447	IAS_SUCCESS	Finished
10/08/2001 15:12:46	PT\VRay	10/08/2001 15:58:20	00:45:34	192.168.0.245	612,118	188,818	IAS_SUCCESS	Finished
10/09/2001 13:18:09	PT\VRay	10/09/2001 13:19:03	00:00:54	192.168.0.240	23,590	12,148	IAS_SUCCESS	Finished
10/09/2001 21:10:15	medicine	10/09/2001 21:10:15	00:00:00				IAS_AUTH_FAI...	Rejected
10/09/2001 21:42:38	PT\GIEngineer	10/09/2001 21:56:53	00:14:15	192.168.0.241	499,737	134,397	IAS_SUCCESS	Finished
10/11/2001 18:17:31	Farpost	10/11/2001 18:23:38	00:06:07	192.168.0.246	4,122	4,956	IAS_SUCCESS	Finished
10/12/2001 19:37:51	Farpost	10/12/2001 19:40:15	00:02:24	192.168.0.246	11,674	2,155	IAS_SUCCESS	Finished
10/12/2001 19:41:43	Farpost	10/12/2001 19:43:40	00:01:57	192.168.0.247	1,366	1,117	IAS_SUCCESS	Finished
10/13/2001 11:55:46	Farpost	10/13/2001 11:58:03	00:02:17	192.168.0.247	1,407	1,308	IAS_SUCCESS	Finished

Estimated time: Designing and programming a new SQL import script is about 30 minutes work and running the script is automated. Due to the previous law enforcement requests for the same data it would seem reasonable to conclude that an import script had already been developed.

Estimated human resources: one junior administrator/programmer

- e. Loading the data ported to the SQL server into the SQL database and reporting structures that had to be established.

<sup>22</sup> Appendix G, the Deep Software Web Site, help files

- i. This statement is somewhat confusing. The previous task of “programming and constantly running an import script” would have accomplished the task of populating the SQL database with the required data. Therefore, I don’t estimate any time required to complete this as it would have been inherently completed at the same time as the previous task.
- f. Cloning the current Customer Relationship Management (“CRM”) database and attaching it to the new SQL server, in order to allow the new SQL server to match the user login information imported from the RADIUS files with customer account information, without causing the searching activities involved in this matching to affect normal daily activities:
  - i. This process is to enable the ‘in production’ customer information to be taken offline and used for the required analysis against the RADIUS logs. The customer database would not be very large having only 200k to 400k records.

Estimated time to copy: 1 hour.

Estimated human resources: one junior administrator
- g. Designing, programming, and optimizing SQL queries to conduct the matching and other data manipulation required to determine which user log-in was associated with which IP address and with which service order, which in turn is associated with a customer account, at which time. Building indexes to make the results of these queries retrievable:
  - i. What Mr. Gaudrault is trying to describe is the constructing (programming) of a ‘statement’ or query that will be sent to the SQL database to return the desired results. For example, a ‘statement’ such as “give me all the records that match the IP address of the 2,114 IP addresses, limit the result list between

certain dates. Include in the result list the customer information matched between the customer ID in the RADIUS log and the customer information from the CRM”.

Estimated time to complete: one hour

Estimated human resources: one junior programmer

- h. Running the queries against each IP address and timestamp provided by Voltage. Because of differences in how the data was provided and how it is stored by TekSavvy, this required a manual correlation of the timestamps, which (TekSavvy was) not able to automate:
  - i. I have no knowledge of the “differences in how the data was provided and how it is stored” and therefore cannot comment on why TekSavvy could not automate this process. However, generally, the concept is that the SQL statement that is programmed in the script requires access to the 2,114 IP addresses supplied by Voltage. The script needs to know when one IP address ends and another begins which is usually accomplished by having each IP address properly delimited by unique characters or individually on a new line. Once the script is programmed there is no further work to be performed therefore this task would appear to be redundant. A similar process would have been completed if the IAS Log Viewer had been utilized.

31. The total time to complete this work is estimated at 14 man hours.

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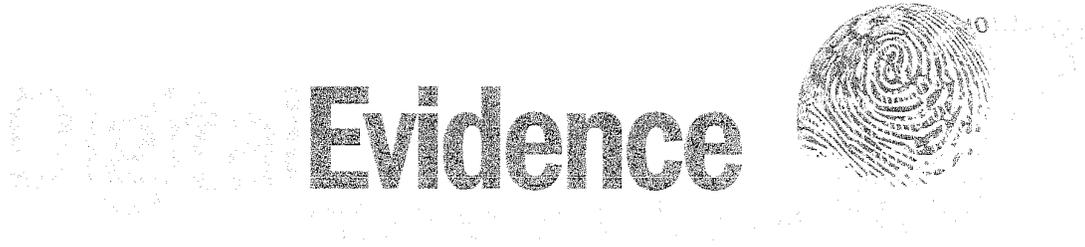
/

32. This report is intended for use only in connection with the subject litigation and is not to be used or referred to for any other purpose. I reserve the right to revise or amend my comments and conclusions referred to in this report if I consider it necessary in light of any facts which become known to me subsequent to the date of this report.



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Steven L. Rogers, EnCE, A+, CNA  
July 30, 2014



# SCHEDULE 1

Digital Evidence International Inc.  
400 Queens Ave.,  
London ON N6B 1X9  
O: (519) 471-4120

## CURRICULUM VITAE MR. STEVEN L. ROGERS

### DESIGNATION

A+ Certified Professional  
 CNA (Certified Novell Administrator)  
 EnCE (EnCase Forensic Certified Examiner)  
 Licenced Private Investigator, Province of Ontario, Canada

### EDUCATION

University Certificate, Accounting, Athabasca, Alberta, 1989 to 1996

### EXPERIENCE

- President, Digital Evidence International, Inc., 400 Queens Ave., London, ON – Sept 2003 to present
  1. Manages computer forensics, internet cybercrime investigations and electronic discovery assignments
  2. Conducts computer forensics examinations across all Microsoft operating systems, MAC, Linux and Unix involving such things as corporate mergers and acquisitions, theft of IP, misappropriation of funds, labour disputes, internal thefts, professional misconduct, satellite piracy and regulatory and criminal matters for all of Canada's top law firms and law firms in the United States, Government of Canada and Government of the United States; assists with the execution of Anton Piller orders, Provincial warrants and criminal search warrants
  3. Provides e-discovery services including evidence preservation and data acquisition and analysis from all forms of electromagnetic storage media including work stations, laptops, hand held devices, file servers, email servers, cloud storage and backup tapes for global corporate entities converting over 400 different file types to various litigation support databases or for use with proprietary client interface
  4. Conducts internet cybercrime investigations involving copyright, trademark and patent matters, domain name investigations, online profiling, and many other related investigations
  5. Manages programmers in development of RMS/major case management database for use by corporate, government and police investigators
- National Director, Computer Forensics and e-Discovery, Toronto, ON - April 2002 to Aug 2003
  1. Managed computer forensics specialists and e-discovery service providers
  2. Conducted computer forensics examinations across all Microsoft operating systems, MAC, Linux and Unix involving such things as corporate mergers, theft of IP, labour disputes, internal thefts, professional misconduct, satellite piracy and regulatory matters for clients such as Borden Ladner Gervais LLP, McCarthy Tetrault LLP, Gowling Lafleur Henderson LLP, Government of Canada and Government of the United States; implemented stringent protocol data acquisition and exhibit control to ensure the proper chain of custody protocol is followed; assisted with the execution of Anton Piller orders and criminal search warrants
  3. Provided e-discovery services including data acquisition and analysis from all forms of electromagnetic storage media including hard drives and tapes for global corporate entities and converting over 400 different file types to various litigation support databases
  4. Delivered seminars on computer forensics and e-discovery to government agencies and law firms performing fraud and work place assignments
  5. Provided consultation services for implementation of digital evidence response strategies as well as major case management database control strategies
- Sergeant/Staff Sergeant, RCMP, London, ON, Economic Crime Program, NCO I/c Technological Crime Unit – Computer Forensics, 1996 to March 2002
  1. In charge of an 11 person investigative team conducting computer forensic examination of DOS, Windows 3.X/95/98/NT/2000/XP and Macintosh operating systems; assisted with technical aspects of search informations / warrants, attended search sites for examination and seizure of computer systems, storage devices and peripherals for offences ranging from alien smuggling, international drug smuggling, counterfeit money and credit / debit cards, fraud to homicide
  2. Member of the Management Team, RCMP National Task Force - Major Case Management Software, Implementation Task Force, October 1999 to December 2001
    1. Delivered information sessions to executive members of the RCMP and training sessions to end users

**CURRICULUM VITAE  
MR. STEVEN L. ROGERS**

**EXPERIENCE cont'd**

2. Developed national standard for use of major case management software and roll-out of product nationally to approximately 2000 major crimes investigators in the RCMP
  3. Developed training manuals and syllabus for use of major case management software for RCMP and crown counsel
  4. Delivered training on use of major case management software to RCMP investigators across Canada
  3. Identified risk of liability, created and implemented stringent exhibit control and examination procedures
  4. Expert opinion evidence (computer forensics) in criminal court proceedings
  5. Developed and supported major case management software tools and trained Ontario's 1100 RCMP members conducting approximately 140 major investigations annually
- Corporal to Sergeant, RCMP, Milton, ON, Commercial Crime Section, 1991 to 1996 conducted multi-million dollar international fraud investigations including major projects with Revenue Canada and Ontario Securities Commission for various fraud schemes including advance fee, mortgage, insurance, market and telemarketing
  - Uniform Policing duties from 1978 to 1990 investigating homicides, serious assaults and other criminal code offences

**TRAINING AND PROFESSIONAL DEVELOPMENT**

- 26 Computer Enterprise and Investigations Conference (CEIC), Las Vegas, Nevada May 19 to May 22, 2014
- 31 2013 International Law Enforcement IP Crime Conference, Dublin, Ireland October 15 to October 17, 2013
- 30 3<sup>rd</sup> Annual Underwriters Laboratories Brand Protection Conference, Fort Lauderdale, Florida June 11/12, 2013
- 29 2013 Techno Security and Forensics Investigations 2013 and Mobile Forensics World Conference, Myrtle Beach, SC June 1/3, 2013
- 28 2012 International Law Enforcement IP Crime Conference, Panama City, Panama September 10 to September 13, 2012
- 27 16<sup>TH</sup> Annual Fraud & Anti-Counterfeiting Conference Toronto, Ontario November 30 to December 2, 2011
- 27 2011 International Law Enforcement IP Crime Conference Madrid, Spain September 19 to September 22, 2011
- 26 Computer Enterprise and Investigations Conference (CEIC), Orlando, Florida May 15 to May 18, 2011
- 25 2010 International Law Enforcement IP Crime Conference Hong Kong Oct 19 to Oct 21, 2010
- 24 Osgoode Professional Development's Social Networking Content as Evidence, Teleseminar, Toronto, ON January 13, 2010
- 23 2009 International Law Enforcement IP Crime Conference Dublin, Ireland Sept 30 to Oct 1, 2009
- 22 Guidance Software Inc., Computer and Enterprise Investigations Conference (CEIC) Las Vegas, Nevada April 27 to April 30, 2008
- 21 The High Technology Crime Investigation Association, International Training Conference, San Diego, CA, August 27<sup>th</sup> to August 29<sup>th</sup>, 2007
- 20 The Training Co., Myrtle Beach, SC, Techno Security 2006 Training Conference, June 4<sup>th</sup> to June 7<sup>th</sup>, 2006
- 19 Wetstone Technologies, LiveWire Investigators Course, Myrtle Beach, SC, June 2<sup>nd</sup> to June 3<sup>rd</sup>, 2006
- 18 The High Technology Crime Investigation Association, International Training Conference, South Lake Tahoe, CA, October 20<sup>th</sup> to October 22<sup>nd</sup>, 2003
- 17 The High Technology Crime Investigation Association and The Regional Computer Forensic Group, GMU 2003, Fairfax, VA, August 11<sup>th</sup> to August 15, 2003
- 16 EnCase Certified Examiner (EnCE), January, 2003
- 15 The High Technology Crime Investigation Association and The Regional Computer Forensic Group, GMU 2002, Fairfax, VA, August 12<sup>th</sup> to August 16, 2002
- 14 A Plus Certification, March 2002
- 13 EnCase Advanced Computer Forensic Investigators Course, March 2002
- 12 Implementing a Database on MS SQL Server 7.0, March 2001
- 11 IAFCI, E-Commerce and the Internet In the 21<sup>st</sup> Century: Are You Ready? June 20<sup>th</sup> to June 21, 2000
- 10 Computer Crime Investigative Techniques Level III, February 2000
- 9 Advanced Internet Crime Investigations Course, December 1998
- 8 Macintosh Search and Seizure Course, October 1997
- 7 Certified Novell Administrator, September 1997
- 6 National Telecommunications Fraud Seminar, June 1997
- 5 Computer Crime Investigative Techniques Level I, August 1996

**CURRICULUM VITAE  
MR. STEVEN L. ROGERS**

**TRAINING AND PROFESSIONAL DEVELOPMENT cont'd**

- 4 Computer Crime Investigative Techniques Level II, June 1995
- 3 SuperGravity BatchScan, BatchProcess, Search & Reports Database, April 1995
- 2 Micro Computer Applications in Business, November 1990
- 1 Introduction to Computer Literacy, December 1989

**PRESENTATIONS**

- 37 AICPA Forensic & Valuation Conference, File Attributes and Meta Data... Why Should I Care?, Las Vegas, Nevada, November 10-12, 2013
- 36 Electronic Case Management using the Occurrence and Serious Crime Investigation Database, 3<sup>rd</sup> Annual Underwriters Laboratories Brand Protection Conference, Fort Lauderdale, Florida June 11-12, 2013
- 35 Computer Forensics and Internet Investigations, Unraveling the Mysteries, Metropolitan United Church, London, Ontario, January 18, 2012
- 34 Internet Investigations and the use of DEI's Integrated Case Management database, Coventry, England, May 25-27, 2010
- 33 The Society For The Policing Of Cyberspace, Keynote speaker introduction and member of Plenary Presentation 4, "Collaboration and Prevention", September 29-30, 2008 Vancouver, British Columbia
- 32 The People's Republic of China, Search and Seizure of Digital Evidence and Prosecuting Cyber Crimes, 200 Prosecutor Delegates, May 22-25, 2007 Guangzhou, China
- 31 Xtalk Webex Presentation, Intellectual Property Protection and the Internet, How To Protect Your Online Intellectual Property, Toronto, Ontario March 13, 2007
- 30 Criminal Lawyers' Association, A Painless Introduction to Electronic Evidence and Tech-Crimes Toronto, Ontario November 3, 2006
- 29 InterNetworking, The History, Successes and Services of Digital Evidence International Inc. London, Ontario September 5, 2006
- 28 Canadian Institute – E-Document Management & Discovery – The ABC's of Electronic Data: A Basic Guide to Understanding How E-Documents are Stored and Recovered, Toronto, ON January 30-31, 2006
- 27 Borden Ladner Gervais LLP, Civil Procedures and E-Everything, Understanding E-Issues Toronto, Ontario June 16, 2005
- 26 Cohen Highley, LLP, Digital Evidence, Are You Finding Yours? London, Ontario Sept 16, 2004
- 25 Instructor, EnCase Intermediate Analysis and Reporting, Markham, Ontario June 14-18, 2004
- 24 Instructor, EnCase Intermediate Analysis and Reporting, Markham, Ontario May 11-14, 2004
- 23 Instructor, EnCase Intermediate Analysis and Reporting, Markham, Ontario March 2-5, 2004
- 22 Investment Dealers Association, Computer Forensics Today, Tips to Assist Financial Investigators, Toronto, Ontario January 14, 2004
- 21 Strategy Institute, Electronic Evidence, Selecting a Technical Expert for Digital Evidence, Tips to Assist the Decision Making Process, Toronto, Ontario December 9, 2003
- 20 Association of Certified Forensics Investigators of Canada, Forensic Accounting, Computer Forensics and e-Discovery, The Total Forensics Solution, Toronto, Ontario May 27, 2003
- 19 Strategy Institute, Electronic Evidence, E-Mail System Processes, Policy and Procedures, What You Need to Know to Protect Your Organization, May 20, 2003
- 18 Federated Press – Workplace Investigations, Computer Forensics and Electronic Discovery in Litigation, February 26, 2003
- 17 Association of Certified Fraud Examiners - Computer Forensics and Electronic Discovery in Litigation, January 2003
- 16 Canadian Corporate Counsel Association – Saskatchewan Chapter, Forensic Accounting, Computer Forensics and Electronic Discovery In Litigation, January 2003
- 15 Institute of Chartered Accountants of Ontario, The Fundamentals of Computer Forensics, November 13, 2002
- 14 The Canadian Corporate Counsel Association, Using Computer Forensics and Other Technologies to Gain the Winning Edge in Litigation, August 13, 2002
- 13 Royal Bank of Canada, First Responder Strategy, June 11, 2002
- 12 Clarica, Email Conversion And Management June 6, 2002
- 11 Fraser Milner Casgrain, Computer Forensics, An Overview, May 23, 2002

**CURRICULUM VITAE  
MR. STEVEN L. ROGERS**

**PRESENTATIONS cont'd**

- 10 McMillan Binch, Computer Forensics, An Overview, May 2, 2002
- 9 Computer Forensics In Litigation Conference-Hidden In Plain View-Uncovering Digital Evidence, February 28, 2002
- 8 Digital Evidence Workshop, Canada Society of Forensic Science, November 2001
- 7 RCMP Major Case Management/Disclosure Workshop, February 2001
- 6 Toronto Police Service Fraud Conference, Electronic Case Management, Disclosure and Prosecution, December 2000
- 5 RCMP Proceeds of Crime, Financial Crimes Workshop – Electronic Case Management, Disclosure and Prosecution, November 2000
- 4 Association of Certified Fraud Examiners, Electronic Case Management, November 2000
- 3 Fraud Investigative Techniques, Computer Crime, Ontario Police College, 1997 to 1999
- 2 SUPERtext Research, Database Management (scanning and processing) across Canada, 1996 to 2002
- 1 RCMP SUPERText Research Case Management Software User Group, January 1994 to March 1995

**PROFESSIONAL AFFILIATIONS / MEMBERSHIPS**

1. High Technology Crime Consortium (HTCC)
2. High Technology Crime Network (HTCN)
3. Advisor to POLCYB, The Society for Policing Cyberspace
4. Computer Forensics Tool Testing
5. Digital Forensic Research Workshop
6. Litigation Support List Serv
7. Litigation Support Vendors Association

**AWARDS/COMMENDATIONS**

1. RCMP Best Practices Recognition Award for development of Major Case Management Systems and Disclosure Requirements software, May 30, 2002
2. RCMP Commanding Officer's Commendation for outstanding performance during an international fraud investigation March, 2001

**REPORTS, EXPERT REPORTS, AFFIDAVITS AND DECLARATIONS**

To the best of my knowledge the matters for which I have provided reports, expert reports or affidavit evidence include:

1. Guarantee Corporation of North America vs. Cogema Resources Inc., Saskatoon, Saskatchewan
2. WEHU vs. Sean Murphy "et al", Windsor, Ontario
3. Husky Injection Moldings Systems Ltd vs. Ohjae Kwon "et al", Toronto, Ontario
4. EchoStar Satellite Corporation "et al" vs. Steve Souphanthong, Toronto, Ontario
5. R. vs. Fred Ghavami, Toronto, Ontario
6. Walden Electrical Limited vs. Lopes Mechanical Limited "et al", Ottawa, Ontario
7. Levert Personnel Resources Inc. vs. Mark Leclair "et al", Ottawa, Ontario
8. Invis Inc. vs. Adam Hedley "et al", Toronto, Ontario
9. DirecTV vs. Paul Cater "et al", Toronto, Ontario
10. EchoStar Satellite Corporation "et al" vs. Troy McGill "et al", Toronto, Ontario;
11. EchoStar Satellite Corporation "et al" vs. Jeremy Corkery "et al", Hamilton, Ontario;

**CURRICULUM VITAE  
MR. STEVEN L. ROGERS**

**REPORTS, EXPERT REPORTS, AFFIDAVITS AND DECLARATIONS cont'd**

12. EchoStar Satellite Corporation “et al” vs. Rudy Torroni, “et al”, Barrie, Ontario;
13. EchoStar Satellite Corporation “et al” vs. NDS Group PLC, “et al”, Los Angeles, California;
14. EchoStar Satellite Corporation “et al” vs. Andrew Bate, “et al”, Vancouver, BC;
15. EchoStar Satellite Corporation “et al” vs. Stefany Allaire, “et al”, Montreal, Quebec;
16. EchoStar Satellite Corporation “et al” vs. William Taskas “et al”, Toronto, Ontario;
17. Bell ExpressVu “et al” vs. Jonathon Cohen “et al”, Toronto, Ontario;
18. DirecTV vs. Zed Marketing Inc. ‘et al’, Toronto, Ontario;
19. West Coast Engineering Group Ltd vs. Luiss Ioan Barcan, Vancouver, BC;
20. NAC Air, LP vs. Wasaya Airways Limited Partnership ‘et al’, Thunder Bay, Ontario;
21. Bell ExpressVu ‘et al’ vs. Bill Ilkov, Toronto, Ontario;
22. Ontario Securities Commission vs. Shane Suman 'et al', Toronto, Ontario;
23. US Securities and Exchange Commission vs. Shane Suman 'et al', Washington, DC;
24. EchoStar Satellite Corp Corporation “et al” vs. Robert Ward, Tampa, Florida;
25. DISH Network L.L.C. “et al” vs. Khachik Bagdasaryan, California;
26. DISH Network L.L.C. “et al” vs. Viewtech, California;
27. DISH Network L.L.C. “et al” vs. Panarex Inc, California;
28. DISH Network L.L.C. “et al” vs. Ravin Ramkissoon, Toronto, Ontario;
29. Toronto Police Service vs. Det. Insp. Steve Izzett, Toronto, Ontario;
30. Jeffrey Seidman vs College of Physicians and Surgeons of Ontario, Toronto, Ontario;
31. DISH Network L.L.C. “et al” vs. David Friedman, Eastern District of New York;
32. R vs Deborah Deickmann, Brampton, Ontario;
33. Nova Growth Corp ‘et al’ ats Kepinski ‘et al’, Toronto, Ontario;
34. DISH Network L.L.C. “et al” vs. Richard Layer, Northern District of Georgia, Atlanta Division;
35. DISH Network L.L.C. “et al” vs. William Scott, Western District of New York;
36. Elgner vs Elgner (Initial Expert Report), Toronto, Ontario;
37. Elgner vs Elgner (Supplementary Expert Report), Toronto, Ontario;
38. DISH Network L.L.C. “et al” vs. Daniel Arriola, Central District of California;
39. Elgner vs Elgner (Additional Supplementary Expert Report), Toronto, Ontario;
40. Elgner vs Elgner (Reply Expert Report), Toronto, Ontario;
41. DISH Network L.L.C. “et al” vs. Jeffrey Parsons, Western District of North Carolina, Statesville Division;
42. DISH Network L.L.C. “et al” vs. Elbert Powell, Middle District of Alabama, Northern Division;
43. DISH Network L.L.C. “et al” vs. Leland Steele, Southern District of Iowa, Eastern Division;
44. DISH Network L.L.C. “et al” vs. Frederick Wiley. District of Delaware;
45. DISH Network L.L.C. “et al” vs. Gary Venning, District of South Carolina, Charleston Division;
46. DISH Network L.L.C. “et al” vs. Benjamin Jones, Eastern District of Pennsylvania
47. DISH Network L.L.C. “et al” vs. Daniel Palmer, District of Rhode Island
48. DISH Network L.L.C. “et al” vs. Jeffrey Hardison, Eastern District of North Carolina, Eastern Division
49. DISH Network L.L.C. “et al” vs. Adrian Shawn Khan, Northern District of Georgia, Atlanta Division
50. DISH Network L.L.C. “et al” vs. Tan Nguyen, “et al”, Central District of California, Southern Division
51. DISH Network L.L.C. “et al” vs. All Things Digital, Inc. “et al”, US District Court, Southern District of Florida
52. DISH Network L.L.C. “et al” vs. Aaron Keown, US District Court, Southern District of Indiana, New Albany Division

**CURRICULUM VITAE  
MR. STEVEN L. ROGERS**

**REPORTS, EXPERT REPORTS, AFFIDAVITS AND DECLARATIONS cont'd**

53. DISH Network L.L.C. “et al” vs. Azhar Farooqui, US District Court, Southern District of Indiana, Indianapolis Division
54. DISH Network L.L.C. “et al” vs. Armando Gonzalez, US District Court, Eastern District of California
55. DISH Network L.L.C. “et al” vs. Soo Jong Yeo ‘et al’, US District Court, Southern District of California
56. DISH Network L.L.C. “et al” vs. Steven McKenney, US District Court, Southern District of California
57. DISH Network L.L.C. “et al” vs. Bill Williamson, US District Court, Eastern District of Tennessee, Northern Division
58. DISH Network L.L.C. “et al” vs. Juan Torres, US District Court, Central District of California, Western Division
59. DISH Network L.L.C. “et al” vs. Thieu Quang Dam, US District Court, Northern District of Illinois, Eastern Division
60. DISH Network L.L.C. “et al” vs. Joseph Magistro, US District Court, Middle District of Pennsylvania
61. DISH Network L.L.C. “et al” vs. Zakir Bhuiya, US District Court, Eastern District of Pennsylvania
62. DISH Network L.L.C. “et al” vs. Juan Gomez, US District Court, Middle District of North Carolina
63. DISH Network L.L.C. “et al” vs. John Hanna, US District Court, Northern District of Ohio, Eastern Division
64. DISH Network L.L.C. “et al” vs. Randy Howard, US District Court, Northern District of Indiana, South Bend Division
65. DISH Network L.L.C. “et al” vs. Edward Bradley, US District Court, Southern District of Florida
66. DISH Network L.L.C. “et al” vs. Paul Williams, US District Court, Northern District of Illinois, Eastern Division
67. DISH Network L.L.C. “et al” vs. Mike Jennings, US District Court, Middle District of Florida, Jacksonville Division
68. DISH Network L.L.C. “et al” vs. Clayton Hoggard, US District Court, Eastern District of California
69. DISH Network L.L.C. “et al” vs. Aracely Espinoza ‘et al’, US District Court, Central District of California, Eastern Division
70. DISH Network L.L.C. “et al” vs. Robert Prescott, US District Court, Western District of Michigan, Southern Division
71. DISH Network L.L.C. “et al” vs. Crystal Boeff, US District Court, Western District of Michigan, Southern Division
72. DISH Network L.L.C. “et al” vs. Eugene Klisiak, US District Court, Western District of Michigan, Southern Division
73. DISH Network L.L.C. “et al” vs. Michael Smart, US District Court, Middle District of Louisiana
74. DISH Network L.L.C. “et al” vs. Kenneth Scott, US District Court, Eastern District of Louisiana
75. DISH Network L.L.C. “et al” vs. Thurman Howard, US District Court, Western District of Kentucky, Owensboro Division
76. DISH Network L.L.C. “et al” vs. Thieu Quang Dam, US Bankruptcy Court, Northern District of Illinois, Eastern Division
77. DISH Network L.L.C. “et al” vs. Dang Phan, US District Court, Southern District of Texas, Houston Division
78. DISH Network L.L.C. “et al” vs. Angel Davila, US District Court, District of Puerto Rico
79. DISH Network L.L.C. “et al” vs. Joseph Walnoha, US District Court, Southern District of Texas, Houston Division
80. DISH Network L.L.C. “et al” vs. Conrad Roemke, US District Court, Southern District of Texas, Houston Division
81. DISH Network L.L.C. “et al” vs. Jose Roman, US District Court, Western District of Texas, San Antonio Division
82. DISH Network L.L.C. “et al” vs. Roy Kitzmiller, US District Court, Eastern District of Tennessee, Greenville

**CURRICULUM VITAE  
MR. STEVEN L. ROGERS**

**REPORTS, EXPERT REPORTS, AFFIDAVITS AND DECLARATIONS cont'd**

83. DISH Network L.L.C. "et al" vs. Phil Winfield, US District Court, Southern District of Texas, Houston Division
84. DISH Network L.L.C. "et al" vs. Gerson Tendler, US District Court, District of New Hampshire
85. DISH Network L.L.C. "et al" vs. Rajbir Sidhu, US District Court, District of New Jersey

**CURRICULUM VITAE  
MR. STEVEN L. ROGERS**

**VIVA VOCE EVIDENCE**

To the best of my knowledge the matters for which I attended and gave viva voce evidence on digital evidence include:

1. R. vs. Jack Kalederian “et al”, Waterloo, Ontario (**qualified as expert witness- criminal, prosecution**);
2. EchoStar Satellite Corp, “et al” vs. Steve Souphanthong, Toronto, Ontario; (**civil, plaintiff**);
3. EchoStar Satellite Corp, “et al” vs. Stephen Rodgers, Toronto, Ontario; (**civil, plaintiff**);
4. EchoStar Satellite Corp, “et al” vs. NDS Group PLC, “et al”, Los Angeles, California; (**civil, plaintiff**);
5. Walden Electrical Limited vs. Lopes Mechanical Limited “et al”, Ottawa, Ontario (**civil, defence**);
6. SSI Equipment Inc vs. IFC, Hamilton, Ontario; (**qualified as an expert witness- civil, plaintiff**);
7. Ontario Securities Commission vs. Shane Suman 'et al', Toronto, Ontario (**qualified as an expert witness - administrative**);
8. DISH Network L.L.C. “et al” vs. Ravin Ramkissoon “et al”, Toronto, Ontario;
9. R. vs. Obrien et al, Newmarket, Ontario (**Ontario Securities Commission matter – criminal, prosecution**);
10. Toronto Police Service vs. Det. Insp. Steve Izzett, Toronto, ON (**qualified as an expert witness - Police Services Act, prosecution**);
11. R. vs. Deborah Deickmann, Brampton, Ontario (**qualified as expert witness - criminal, defence**) and
12. Nova Growth Corp ‘et al’ ats Kepinski ‘et al’, Toronto, Ontario (**qualified as expert witness - civil, defence**)

**COURT APPOINTED COMPUTER FORENSIC EXPERT**

1. Richard Warman vs. Ezra Levant 'et al', Ontario Superior Court of Justice, Toronto, Ontario;
2. Reliance Comfort Limited Partnership vs. National Energy Corporation, Ontario Superior Court of Justice, Toronto, Ontario
3. R vs. Kenneth James, Ontario Superior Court of Justice, Toronto, Ontario
4. R vs. Martin Schulz, Ontario Superior Court of Justice (Central West Region), Milton, Ontario



# APPENDIX A

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**In·ter·net** noun \ˈin-tər-net\

Definition of INTERNET

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: an electronic communications network that connects computer networks and organizational computer facilities around the world

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First Known Use of INTERNET

1985

Other Telecommunications Terms

[Ethernet](#), [intercept](#)

**Internet** noun (Concise Encyclopedia)

Publicly accessible computer **NETWORK** connecting many smaller networks from around the world. It grew out of a U.S. Defense Department program called ARPANET (Advanced Research Projects Agency Network), established in 1969 with connections between computers at the University of California at Los Angeles, Stanford Research Institute, the University of California-Santa Barbara, and the University of Utah. ARPANET's purpose was to conduct research into computer networking in order to provide a secure and survivable communications system in case of war. As the network quickly expanded, academics and researchers in other fields began to use it as well. In 1971 the first program for sending **E-MAIL** over a distributed network was developed; by 1973, the year international connections to ARPANET were made (from Britain and Norway), e-mail represented most of the traffic on ARPANET. The 1970s also saw the development of mailing lists, **NEWSGROUPS** and **BULLETIN-BOARD SYSTEMS**, and the **TCP/IP** communications **PROTOCOLS**, which were adopted as standard protocols for ARPANET in 1982-83, leading to the widespread use of the term Internet. In 1984 the **DOMAIN NAME** addressing system was introduced. In 1986 the National

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## Internet - Definition and More from the Free Merriam-Webster Dictionary

Science Foundation established the NSFNET, a distributed network of networks capable of handling far greater traffic, and within a year more than 10,000 hosts were connected to the Internet. In 1988 real-time conversation over the network became possible with the development of Internet Relay Chat protocols (see [CHAT](#)). In 1990 ARPANET ceased to exist, leaving behind the NSFNET, and the first commercial dial-up access to the Internet became available. In 1991 the [WORLD WIDE WEB](#) was released to the public (via [FTP](#)). The Mosaic [BROWSER](#) was released in 1993, and its popularity led to the proliferation of World Wide Web sites and users. In 1995 the NSFNET reverted to the role of a research network, leaving Internet traffic to be routed through network providers rather than NSF supercomputers. That year the Web became the most popular part of the Internet, surpassing the FTP protocols in traffic volume. By 1997 there were more than 10 million hosts on the Internet and more than 1 million registered domain names. Internet access can now be gained via radio signals, cable-television lines, satellites, and fibre-optic connections, though most traffic still uses a part of the public telecommunications (telephone) network. The Internet is widely regarded as a development of vast significance that will affect nearly every aspect of human culture and commerce in ways still only dimly discernible.

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# APPENDIX B

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# Private network

From Wikipedia, the free encyclopedia

In the Internet addressing architecture, a private network is a network that uses private IP address space, following the standards set by RFC 1918 for Internet Protocol Version 4 (IPv4), and RFC 4193 for Internet Protocol Version 6 (IPv6). These addresses are commonly used for home, office, and enterprise local area networks (LANs), when globally routable addresses are not mandatory, or are not available for the intended network applications. Under IPv4, the private IP address spaces were originally defined in an effort to delay IPv4 address exhaustion, but they are also a feature of IPv6, the next generation Internet Protocol.

These addresses are characterized as private because they are not globally delegated, meaning that they are not allocated to any specific organization, and IP packets addressed with them cannot be transmitted through the public Internet. Anyone may use these addresses without approval from a regional Internet registry (RIR). If such a private network needs to connect to the Internet, it must use either a network address translator (NAT) gateway, or a proxy server.

## Contents

- 1 Private IPv4 address spaces
  - 1.1 Dedicated space for Carrier Grade NAT deployments
- 2 Private IPv6 addresses
- 3 Link-local addresses
  - 3.1 IPv4
  - 3.2 IPv6
- 4 Common uses
- 5 Misrouting
- 6 Merging private networks
- 7 Private use of other reserved addresses
- 8 See also
- 9 RFC References
- 10 Notes
- 11 References

## Private IPv4 address spaces

The Internet Engineering Task Force (IETF) has directed the Internet Assigned Numbers Authority (IANA) to reserve the following IPv4 address ranges for private networks, as published in RFC 1918:<sup>[1]</sup>

RFC1918 name	IP address range	number of addresses	largest CIDR block (subnet mask)	host id size	mask bits	classful description <sup>[Note 1]</sup>
24-bit block	10.0.0.0 - 10.255.255.255	16,777,216	10.0.0.0/8 (255.0.0.0)	24 bits	8 bits	single class A network
20-bit block	172.16.0.0 - 172.31.255.255	1,048,576	172.16.0.0/12 (255.240.0.0)	20 bits	12 bits	16 contiguous class B networks
16-bit block	192.168.0.0 - 192.168.255.255	65,536	192.168.0.0/16 (255.255.0.0)	16 bits	16 bits	256 contiguous class C networks

## Dedicated space for Carrier Grade NAT deployments

In April 2012, IANA allocated 100.64.0.0/10 for use in carrier grade NAT scenarios in RFC 6598.<sup>[3]</sup> This address block should not be used either on private networks or on the public Internet: it is intended only for use within the internal operations of carrier networks. The size of the address block ( $2^{22}$ , approximately 4 million, addresses) was selected to be large enough to uniquely number all customer access devices for all of a single operator's points of presence in a large metropolitan area such as the Tokyo metropolitan area.<sup>[3]</sup>

## Private IPv6 addresses

The concept of private networks and special address reservation for such networks has been carried over to the next generation of the Internet Protocol, IPv6.

The address block `fc00::/7` has been reserved by IANA as described in RFC 4193. These addresses are called Unique Local Addresses (ULA). They are defined as being unicast in character and contain a 40-bit random number in the routing prefix to prevent collisions when two private networks are interconnected. Despite being inherently local in usage, the IPv6 address scope of unique local addresses is global.

A former standard proposed the use of so-called "site-local" addresses in the `fec0::/10` range, but due to major concerns about scalability and the poor definition of what constitutes a site, its use has been deprecated since September 2004 by RFC 3879.

## Link-local addresses

Another type of private networking uses the link-local address range. The validity of link-local addresses is limited to a single link; e.g. to all computers connected to a switch, or to one wireless network. Hosts on different sides of a bridge are also on the same link, whereas hosts on different sides of a router are on different links.

## IPv4

In IPv4, link-local addresses are codified in RFC 6890 and RFC 3927. Their utility is in self-autoconfiguration by network devices when Dynamic Host Configuration Protocol (DHCP) services are not available and manual configuration by a network administrator is not desirable.

The block 169.254.0.0/16 is reserved for this purpose, with the exception of the first and the last /24 subnets in the range. If a host on an IEEE 802 (ethernet) network cannot obtain a network address via DHCP, an address from 169.254.1.0 to 169.254.254.255 may be assigned pseudorandomly. The standard prescribes that address collisions must be handled gracefully.

## IPv6

In IPv6, link-local addresses are codified in RFC 4862. Their use is mandatory, and an integral part of the IPv6 standard.

The IPv6 addressing architecture (RFC 4291) sets aside the block `fe80::/10` for IP address autoconfiguration.

## Common uses

The most common use of private addresses is in residential networks, since most Internet service providers (ISPs) only allocate a single publicly routable IP address to each residential customer, but many homes have more than one computer or other Internet connected device, such as smartphones. In this situation, a network address translator (NAT/PAT) gateway is usually used to provide Internet connectivity to multiple hosts.

Private addresses are also commonly used in corporate networks, which for security reasons, are not connected directly to the Internet. Often a proxy, SOCKS gateway, or similar devices are used to provide restricted Internet access to network-internal users.

In both cases, private addresses are often seen as enhancing network security for the internal network, since it is difficult for an Internet host to connect directly to an internal system.

## Misrouting

It is common for packets originating in private address spaces to be misrouted onto the Internet. Private networks often do not properly configure DNS services for addresses used internally and attempt reverse DNS lookups for these addresses, causing extra traffic to the Internet root nameservers. The AS112 project attempted to mitigate this load by providing special blackhole anycast nameservers for private address ranges which only return negative result codes (not found) for these queries.

Organizational edge routers are usually configured to drop ingress IP traffic for these networks, which can occur either by misconfiguration, or from malicious traffic using a spoofed source address. Less commonly, ISP edge routers drop such egress traffic from customers, which reduces the impact to the Internet of such misconfigured or malicious hosts on the customer's network.

## Merging private networks

Since the private IPv4 address space is relatively small, many private IPv4 networks use the same address space. This creates a common problem when merging such networks, namely the duplication of addresses on multiple devices. In this case, networks or hosts must be renumbered, often a time-consuming task, or a network address translator must be placed between the networks to masquerade the duplicated addresses.

To mitigate this problem for IPv6, RFC 4193 specifies a large (40-bit) unique Global ID to be pseudo-randomly generated by each organization using Unique Global Addresses. It is very unlikely that two network addresses generated in this way will be the same.

## Private use of other reserved addresses

Historically address blocks other than the private address ranges have been reserved for potential future uses. Some organizations have used them for private networking applications despite official warnings of possible future address collisions. Typically these addresses are not referred to as "reserved." IPv4 addresses 240.0.0.0 to 254.255.255.254 (all addresses in 240.0.0.0/4 except 255.0.0.0/8) are designated for future use and research and development.

## See also

- Heartbeat network
- Intranet, a private internet
- Reserved IP addresses

## RFC References

- RFC 1918 – "Address Allocation for Private Internets"
- RFC 2036 – "Observations on the use of Components of the Class A Address Space within the Internet"
- RFC 2050 – "Internet Registry IP Allocation Guidelines"
- RFC 2101 – "IPv4 Address Behaviour Today"
- RFC 2663 – "IP Network Address Translator (NAT) Terminology and Considerations"
- RFC 3022 – "Traditional IP Network Address Translator (Traditional NAT)"
- RFC 3330 – "Special-Use IPv4 Addresses" (superseded)
- RFC 5735 – "Special-Use IPv4 Addresses" (superseded)
- RFC 6890 – "Special-Purpose IP Address Registries"
- RFC 3879 – "Deprecating Site Local Addresses"
- RFC 3927 – "Dynamic Configuration of IPv4 Link-Local Addresses"
- RFC 4193 – "Unique Local IPv6 Unicast Addresses"
- RFC 6598 – "Reserved IPv4 Prefix for Shared Address Space"

## Notes

1. ^ Classful addressing is obsolete and has not been used in the Internet since the implementation of Classless Inter-Domain Routing (CIDR), starting in 1993. For example, while 10.0.0.0/8 was a single class A network, it is common for organizations to divide it into smaller /16 or /24 networks. Contrary to a common misconception, a

/16 subnet of a class A network is not referred to as a class B network. Likewise, a /24 subnet of a class A or B network is not referred to as a class C network. The class is determined by the first three bits of the prefix.<sup>[2]</sup>

## References

- <sup>^</sup> "RFC 1918: Address Allocation for Private Internets" (<http://tools.ietf.org/html/rfc1918#page-4>). IETF. February 1996. p. 4.
- <sup>^</sup> Forouzan, Behrouz (2013). *Data Communications and Networking*. New York: McGraw Hill. pp. 530–31. ISBN 978-0-07-337622-6.
- <sup>^</sup> <sup>a</sup> <sup>b</sup> "RFC 6598: Reserved IPv4 Prefix for Shared Address Space" (<http://tools.ietf.org/html/rfc6598#page-8>). IETF. April 2011. p. 8.

Retrieved from "[http://en.wikipedia.org/w/index.php?title=Private\\_network&oldid=618261658](http://en.wikipedia.org/w/index.php?title=Private_network&oldid=618261658)"

Categories: Internet architecture | Network addressing

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# APPENDIX C

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## Dynamic IP vs Static IP

Static IP addressing is for one customer on one IP address and Dynamic IP addressing assigns a different IP address each time the ISP customer logs on to their computer, but this is dependent upon the Internet Service Provider (ISP) because some ISP's only change the IP address as they deem it necessary.

If you have Dynamic IP Addressing through your Website Host it means that you are sharing an IP Address with several other customers.

If you are a beginner on the internet, an avid internet user, are entertaining the thought of starting your own website business, are a gamer, use VOIP or VPN there are several things you should know about IP Addressing.

### Static IP Addressing

If you feel the need to always know what your IP address is then you need a Static IP address, because it is constant. Static IP addresses are more reliable for [Voice over Internet Protocol](#) (VOIP), more reliable to host a gaming website or to play X-Box, Play Station, use Virtual Private Network for secure access to files from your company network computer, etc. Static IP addresses are also great if you use your computer as a server, as it should give your file server faster file uploads and downloads. Another plus with Static IP's, when hosting a website you are not sharing your IP with another company who sends out a lot of E-mail SPAM and not only has their website been shut down but in turn gets your IP address blacklisted.

In contrast a static IP address can become a security risk, because the address is always the same. Static IP's are easier to track for data mining companies. Static IP addressing is less cost effective than Dynamic IP Addressing.

### Dynamic IP Addressing

The biggest advantages of Dynamic IP Addressing are less security risk as the computer is assigned a new IP address each time the customer logs on, they are cost effective and there is automatic network configuration (the less human intervention with network configuration the better). Dynamic addressing is usually used by ISP's so that one IP address can be assigned to several users, however some ISP's use Sticky Dynamic IP Addressing and do not change the IP address very often. Dynamic IP Addressing can be used by families with several computers or by a small business owner who has a home office. The software that comes with a router allows for [Dynamic Host Configuration Protocol](#) (DHCP) setup and assigns each computer attached to the router an IP address automatically.

In contrast, Dynamic IP addressing should not be used for VOIP, VPN, playing online games or game hosting because Dynamic IP addressing is less reliable than Static IP addressing and could cause the service to disconnect while you are on a VOIP, VPN or gaming.

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## Dynamic and Static IP Address Differences

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# APPENDIX D

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Modem - Definition and More from the Free Merriam-Webster Dictionary

[Ethernet](#), [intercept](#)**modem** *noun* (Concise Encyclopedia)

Electronic device that converts digital data into analog (modulated-wave) signals suitable for transmission over analog telecommunications circuits (e.g., traditional phone lines) and demodulates received analog signals to recover the digital data transmitted. The "modulator/demodulator" thus makes it possible for existing communications channels to support a variety of digital communications, including [E-MAIL](#), [INTERNET](#) access, and [FAX](#) transmissions. An ordinary modem, operating over traditional phone lines, has a data transmission speed limit of about 56 kilobits per second. [ISDN](#) lines allow communications at over twice that rate, and [CABLE MODEMS](#) and [DSL](#) lines have transmission rates of over a million bits per second.

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<sup>1</sup>mo·dem      noun    \mō-dəm also -dəm\

: a device that changes the form of electric signals so that information can be sent through telephone lines from one computer to another computer

Full Definition of MODEM

Like

: a device that converts signals produced by one type of device (as a computer) to a form compatible with another (as a telephone)

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Origin of MODEM

modulator + demodulator  
First Known Use: circa 1952

Other Telecommunications Terms

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<sup>2</sup>modem      verb

Definition of MODEM

transitive verb

: to send (as data) via a modem

First Known Use of MODEM

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# Interpret IAS Format Log Files

2 out of 4 rated this helpful

Updated: October 21, 2008

Applies To: Windows Server 2008, Windows Server 2008 R2

In the Windows NT 4.0 version of Internet Authentication Service (IAS), log files are formatted by using a method in which attributes are logged as attribute-value pairs. This formatting is supported by Network Policy Server (NPS) in Windows Server 2008 and by IAS in Windows Server 2003 and Windows 2000 Server. The logs that use this format are referred to as IAS format log files. However, in Windows Server 2008, Windows Server 2003, and Windows 2000, this format supports the inclusion of additional information in the log file:

- In addition to accounting messages (Accounting-On, Accounting-Off, Accounting-Start, Accounting-Stop, and Accounting-Interim), the NPS server also logs authentication messages (Access-Request, Access-Accept, and Access-Reject).
- All string attributes that contain either unprintable characters or delimiters are printed in hexadecimal format (for example, 0x026).
- If NPS receives an attribute (RADIUS-standard or vendor-specific) that is not defined in the NPS dictionary, it is logged as a string.

## Note

Unless you have migration, compatibility, or other issues that require you to use IAS format, use the database-compatible format or SQL Server logging. Although a database-compatible log file contains a smaller subset of attributes, it contains the attributes required to support most tracking and accounting activities.

## Entries recorded in IAS format log files

The following is an example entry (Access-Request) from an IAS format log file.

```
10.10.10.10,client,06/04/1999,14:42:19,NPS,CLIENTCOMP,6,2,7,1,5,9,61,5,64,1,65,1,31,1
```

The format of this record, which is the same for all records in your log file, includes a header, followed by the attribute-value pairs for all attributes that are contained in the packet.

The first six record fields make up the header and are described in the following table.

Value shown in example	Attribute	ID	Data type	Represents
10.10.10.10	NAS-IP-Address	IAS Header	Text	The IP address of the network access server (NAS) that is sending the request.
client	User-Name	IAS Header	Text	The user name that is requesting access.
06/04/1999	Record-Date	IAS Header	Time	The date that the log is written.
14:42:19	Record-Time	IAS Header	Time	The time that the log is written.
NPS	Service-Name	IAS Header	Text	The name of the service that is running on the RADIUS server.
CLIENTCOMP	Computer-Name	IAS Header	Text	The name of the RADIUS server.

Beyond the header, RADIUS attributes and values are listed in pairs in the following format:

```
<AttributeNumber1>,<ValueForAttributeNumber1>,<AttributeNumber2>,<ValueForAttributeNumber2>
```

For example, the two fields after the header contain a 6 and a 2, which can be interpreted as follows:

- The number 6 represents the RADIUS ID for the Service-Type.
- The number 2 represents the attribute value for the Service-Type. The RADIUS protocol specifies the following values for the Service-Type attribute:
  - 1 = Login

29/7/2014

## Interpret IAS Format Log Files

- o 2 = Framed
- o 3 = Callback Login
- o 4 = Callback Framed
- o 5 = Outbound
- o 6 = Administrative
- o 7 = NAS Prompt
- o 8 = Authenticate Only
- o 9 = Callback NAS Prompt

The value of this attribute is 2 (Framed).

This attribute-value pair is interpreted as Service-Type = Framed, which indicates to the NPS server to provide a framed protocol for the user – for example, Point-to-Point Protocol (PPP) or Serial Line Internet Protocol (SLIP).

The following table describes the RADIUS attributes, listed in numerical order, which can be found in an IAS format log file. Unlike database import log files, which use a fixed sequence of attributes, the sequence of the attributes in IAS format log files depends upon the sequence used by the network access server (NAS). For additional information about the sequence of these records, see the documentation for the NAS.

## Additional information

- This table does not cover vendor-specific attributes (VSAs). For more information about VSAs that are supported by your NAS, see your NAS documentation.
- The entries in the ID column that begin with "IAS" are NPS/IAS-specific attributes. They are not found in the RADIUS protocol.

Attribute	ID	Data type	Represents
User-Name	1	Text	The user identity, as specified by the user.
NAS-IP-Address	4	Text	The IP address of the NAS originating the request.
NAS-Port	5	Number	The physical port number of the NAS originating the request.
Service-Type	6	Number	The type of service that the user has requested.
Framed-Protocol	7	Number	The protocol to be used.
Framed-IP-Address	8	Text	The framed IP address to be configured for the user.
Framed-IP-Netmask	9	Text	The IP netmask to be configured for the user.
Framed-Routing	10	Number	The routing method to be used by the user.
Filter-ID	11	Text	The name of the filter list for the user requesting authentication.
Framed-MTU	12	Number	The maximum transmission unit (MTU) to be configured for the user.
Framed-Compression	13	Number	The compression protocol to be used.
Login-IP-Host	14	Number	The IP address of the host to which the user should be connected.
Login-Service	15	Number	The service that connects the user to the login host.

29/7/2014

## Interpret IAS Format Log Files

Login-TCP-Port	16	Number	The TCP port to which the user is to be connected.
Reply-Message	18	Text	The message displayed to the user when an authentication request is accepted.
Callback-Number	19	Text	The callback phone number.
Callback-ID	20	Text	The name of a location to be called by the access server when performing callback.
Framed-Route	22	Text	The routing information that is configured on the access client.
Framed-IPX-Network	23	Number	The Internetwork Packet Exchange (IPX) network number to be configured on the NAS for the user.
Class	25	Text	<p>The attribute sent to the client in an Access-Accept packet, which is useful for correlating Accounting-Request packets with authentication sessions. The format is:</p> <ul style="list-style-type: none"> <li>• Type contains the value 25 (1 octet).</li> <li>• Length contains a value of 20 or greater (1 octet).</li> <li>• Checksum contains an Adler-32 checksum that is computed over the remainder of the Class attribute (4 octets).</li> <li>• Vendor-ID contains the ID of the NAS vendor (4 octets). The high-order octet is 0 and the low-order 3 octets are the SMI Network Management Private Enterprise Code of the vendor in network byte order, as defined in "Private Enterprise Numbers" at <a href="http://go.microsoft.com/fwlink/?LinkId=131594">http://go.microsoft.com/fwlink/?LinkId=131594</a>.</li> <li>• Version contains the value of 1 (2 octets).</li> <li>• Server-Address contains the IP address of the RADIUS server that issued the Access-Challenge message. For multihomed servers, this is the address of the network interface that received the original Access-Request message (2 octets).</li> <li>• Service-Reboot-Time specifies the time at which the first serial number was returned (8 octets).</li> <li>• Unique-Serial-Number contains a unique number to distinguish an individual connection attempt (8 octets).</li> <li>• String contains information that is used to classify accounting records for additional analysis (0 or more octets). In NPS, the Class attribute is copied into the String field.</li> </ul> <p>The Class attribute is used to match the accounting and authentication records if it is sent by the NAS in the Accounting-Request message. The combination of Serial-Number, Service-Reboot-Time, and Server-Address must be a unique identification for each authentication that the RADIUS server performs.</p>
Vendor-Specific	26	Text	The attribute that is used to support proprietary NAS features.
Session-Timeout	27	Number	The length of time (in seconds) before a session is terminated.
Idle-Timeout	28	Number	The length of idle time (in seconds) before a session is terminated.
Termination-Action	29	Number	The action that the NAS is to take when service is completed.
Called-Station-ID	30	Text	The phone number that is dialed by the user.
Calling-Station-ID	31	Text	The phone number from which the call originated.
NAS-Identifier	32	Text	The string that identifies the NAS originating the request.
Login-LAT-Service	34	Text	The host with which the user is to be connected by Local Area Transport (LAT).

29/7/2014

## Interpret IAS Format Log Files

Login-LAT-Node	35	Text	The node with which the user is to be connected by LAT.
Login-LAT-Group	36	Text	The LAT group codes for which the user is authorized.
Framed-AppleTalk-Link	37	Number	The AppleTalk network number for the serial link to the user (this is used only when the user is a router).
Framed-AppleTalk-Network	38	Number	The AppleTalk network number that the NAS must query for existence in order to allocate the user AppleTalk node.
Framed-AppleTalk-Zone	39	Text	The AppleTalk default zone for the user.
Acct-Status-Type	40	Number	The number that specifies whether an accounting packet starts or stops a bridging, routing, or Terminal Services session.
Acct-Delay-Time	41	Number	The length of time (in seconds) for which the NAS has been sending the same accounting packet.
Acct-Input-Octets	42	Number	The number of octets received by NPS during the session.
Acct-Output-Octets	43	Number	The number of octets sent by NPS during the session.
Acct-Session-ID	44	Text	The unique numeric string that identifies the server session.
Acct-Authentic	45	Number	The number that specifies which server has authenticated an incoming call.
Acct-Session-Time	46	Number	The length of time (in seconds) for which the session has been active.
Acct-Input-Packets	47	Number	The number of packets received by NPS during the session.
Acct-Output-Packets	48	Number	The number of packets sent by NPS during the session.
Acct-Terminate-Cause	49	Number	The reason that a connection was terminated by NPS.
Acct-Multi-SSN-ID	50	Text	The unique numeric string that identifies the multilink session.
Acct-Link-Count	51	Number	The number of links in a multilink session.
Event-Timestamp	55	Time	The date and time that this event occurred on the NAS.
NAS-Port-Type	61	Number	The type of physical port that is used by the NAS originating the request.
Port-Limit	62	Number	The maximum number of ports that the NAS provides to the user.
Login-LAT-Port	63	Number	The port with which the user is connected by LAT.
Tunnel-Type	64	Number	The tunneling protocols to be used.
Tunnel-Medium-Type	65	Number	The transport medium to use when creating a tunnel for protocols. For example, L2TP packets can be sent over multiple link layers.
Tunnel-Client-	66	Text	The IP address of the tunnel client.

29/7/2014

## Interpret IAS Format Log Files

Endpt			
Tunnel-Server-Endpt	67	Text	The IP address of the tunnel server.
Acct-Tunnel-Connection	68	Text	An identifier assigned to the tunnel.
Password-Retry	75	Number	The number of times a user can try to be authenticated before the NAS terminates the connection.
Prompt	76	Number	A number that indicates to the NAS whether or not it should (Prompt=1) or should not (Prompt=0) echo the user response as it is typed.
Connect-Info	77	Text	Information that is used by the NAS to specify the type of connection made. Typical information includes connection speed and data encoding protocols.
Configuration-Token	78	Text	The type of user profile to be used (sent from a RADIUS proxy server to a RADIUS client) in an Access-Accept packet.
Tunnel-Pvt-Group-ID	81	Text	The group ID for a specific tunneled session.
Tunnel-Assignment-ID	82	Text	The tunnel to which a session is to be assigned.
Tunnel-Preference	83	Number	A number that indicates the preference of the tunnel type, as indicated by the Tunnel-Type attribute when multiple tunnel types are supported by the NAS.
Acct-Interim-Interval	85	Number	The length of interval (in seconds) between each interim update sent by the NAS.
Ascend	107 to 255	Text	The vendor-specific attributes for Ascend. For more information, see the Ascend documentation.
Client-IP-Address	IAS 4108	Text	The IP address of the RADIUS client.
NAS-Manufacturer	IAS 4116	Number	The manufacturer of the NAS.
MS-CHAP-Error	IAS 4121	Number	The error data that describes a Microsoft Challenge Handshake Authentication Protocol (MS-CHAP) transaction.
Authentication-Type	IAS 4127	Number	The authentication scheme that is used to verify the user.
Client-Friendly-Name	IAS 4128	Text	The friendly name for the RADIUS client.
SAM-Account-Name	IAS 4129	Text	The user account name in the Security Accounts Manager (SAM) database.
Fully-Qualified-User-Name	IAS 4130	Text	The user name in canonical format.
EAP-Friendly-Name	IAS 4132	Text	The friendly name that is used with Extensible Authentication Protocol (EAP).
Packet-Type	IAS 4136	Number	The type of packet, which can be: <ul style="list-style-type: none"> <li>• 1 = Accept-Request</li> <li>• 2 = Access-Accept</li> <li>• 3 = Access-Reject</li> </ul>

			<ul style="list-style-type: none"> <li>• 4 = Accounting-Request</li> </ul>
Reason-Code	IAS 4142	Number	<p>The reason for rejecting a connection request:</p> <ul style="list-style-type: none"> <li>• 00 = Success</li> <li>• 01 = Internal error</li> <li>• 02 = Access denied</li> <li>• 03 = Malformed request</li> <li>• 04 = Global catalog unavailable</li> <li>• 05 = Domain unavailable</li> <li>• 06 = Server unavailable</li> <li>• 07 = No such domain</li> <li>• 08 = No such user</li> <li>• 16 = Authentication failure</li> <li>• 17 = Password change failure</li> <li>• 18 = Unsupported authentication type</li> <li>• 19 = No reversibly encrypted password is stored for the user account</li> <li>• 32 = Local users only</li> <li>• 33 = Password must be changed</li> <li>• 34 = Account disabled</li> <li>• 35 = Account expired</li> <li>• 36 = Account locked out</li> <li>• 37 = Logon hours are not valid</li> <li>• 38 = Account restriction</li> <li>• 48 = Did not match network policy</li> <li>• 49 = Did not match connection request policy</li> <li>• 64 = Dial-in locked out</li> <li>• 65 = Dial-in disabled</li> <li>• 66 = Authentication type is not valid</li> <li>• 67 = Calling station is not valid</li> <li>• 68 = Dial-in hours are not valid</li> <li>• 69 = Called station is not valid</li> <li>• 70 = Port type is not valid</li> <li>• 71 = Restriction is not valid</li> <li>• 80 = No record</li> <li>• 96 = Session timed out</li> <li>• 97 = Unexpected request</li> </ul>
NP-Policy-	IAS	Text	The friendly name of a network policy.

Name	4149		
------	------	--	--

## Attributes that are not recorded in IAS format log files

Although most attributes sent by access servers are logged in IAS format log files, some attributes are not logged because they contain sensitive information. For example, user passwords are not logged for security reasons. The following table lists some of the attributes that are not logged.

Attribute name	ID/Description
User-Password	2
CHAP-Password	3
State	24
Proxy-State	33
CHAP-Challenge	60
Tunnel-Password	69
EAP-Message	79
Signature	80
MS-CHAP-Challenge	Microsoft vendor-specific attribute
MS-CHAP-Response	Microsoft vendor-specific attribute
MS-CHAP-CPW-1	Microsoft vendor-specific attribute
MS-CHAP-CPW-2	Microsoft vendor-specific attribute
MS-CHAP-LM-Enc-PW	Microsoft vendor-specific attribute
MS-CHAP-NT-Enc-PW	Microsoft vendor-specific attribute
MS-CHAP-MPPE-Keys	Microsoft vendor-specific attribute
MS-MPPE-Send-Key	Microsoft vendor-specific attribute
MS-MPPE-Recv-Key	Microsoft vendor-specific attribute
MS-Filter	Microsoft vendor-specific attribute
MS-CHAP2-Response	Microsoft vendor-specific attribute
MS-CHAP2-Success	Microsoft vendor-specific attribute
MS-CHAP2-CPW	Microsoft vendor-specific attribute

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## Community Additions

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Interpret IAS Format Log Files

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## IAS Log Viewer

### Overview

IAS Log Viewer is an administrative tool for viewing, understanding and analyzing log files from Microsoft IAS server.

With the IAS Log Viewer you can view log files at user-friendly form and use it as a lite RADIUS reporting tool for Microsoft Windows IAS server.

IAS Log Viewer has a many unique features and benefits:

- The fast and correct work with huge log files.
- Support both IAS-formatted and database-import formats of IAS log file.
- Open several log files or several directories with IAS log files.
- The smart bad lines detection module. The IAS Log Viewer skip bad lines in log file automatically.
- Work with log files at real time. You can see records that just added by IAS automatically. No log file reopen, no refresh!
- The real time connections view. You can see RRAS connections in real time!
- Real-time monitor. Allows to see current metrics of ias server.
- You can export IAS log records or RRAS connections to XML or CSV file.
- Usage report and user usage report can be created in HTML, XML or CSV formats. The columns of that reports can be customized.
- Command-line options for automate log files processing.
- Additional filter for specifies reports data.
- Cisco-AV-Pair fields support.
- Alerts. Allows to generate action while specified event was occur.
- User defined columns. You can create your own columns with any data and use its in views/reports.

### Types of Editions

Two editions are available in order to let you choose the most appropriate solution for your business: Standard and Professional.

The Standard edition is a less expensive and not support some interesting features. The Professional edition support all features that IAS Log Viewer provide. In details about difference between editions you may read [here](#)

### Download

File	Size	Description
<a href="#">IASviewer.zip</a>	2.8Mb	Version 2.88 with setup program
<a href="#">IASviewerN.zip</a>	2.4Mb	Version 2.88 without setup program

### Registration

The IAS Log Viewer is a shareware product. If you find it useful and want to receive registration code, please [register your copy of IAS Log Viewer now!](#) After registration you will get the registration code and can unlock all trial limitations.

30/7/2014

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## IAS Log Viewer - Frequently Asked Questions

### Common questions

#### What is IAS Log Viewer?

IAS Log Viewer is an administrative tool for viewing, understanding and analyzing log files from Microsoft IAS service. IAS Log Viewer is a reporting tool allows to generate useful reports from Microsoft IAS service log files.

#### What is IAS?

Internet Authentication Service (IAS) is the Microsoft implementation of a Remote Authentication Dial-In User Service (RADIUS) server in Windows 2000 Server and a RADIUS server and proxy in Windows Server 2003. You may read more about Microsoft IAS service starting from [here](#)

#### What is IAS log file?

Microsoft IAS service log information such as user authentication requests, accounting requests, and periodic data. IAS Log files contain that audit and usage information.

#### How a correct IAS log file looks like

The IAS log file has no fixed structure of data. It is very flexible. The amount of lines per connect is not fixed. The amount of fields in each line is not fixed, too. Each connect in a correct IAS log file consists of several records .... [read more](#)

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An subscription covers access to any relevant support and software updates. All commercial licenses include 1,2 or 3 year free subscription (commencing from the date of purchase). The subscription gives you free product upgrades and free technical support during subscription period beginning with the date of purchase.

#### When will my maintenance plan expire?

The subscription started from the date of purchase.

Information about your existing subscription is available in the Help -> Registration dialog within the application. If this information is not up to date, then you may need to enter you license key again in the Help -> Registration dialog to refresh it.

#### Can I still use the software without an active subscription? What happens after then?

Yes, you can continue to use program after the subscription period expires.

After the first 1,2 or 3 year (depend of buying license), your initial subscription will expire and you will no longer enjoy free application updates and technical support. Renewing your subscription is done purely at your discretion. We suggest you renew it in advance of your maintenance expiration to ensure uninterrupted access to the support and software updates.

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- [Benefits](#)
- [Screenshots](#)
- [Revision History](#) **RSS**
- [Subscription Model](#)
- [Editions](#)

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- [Additional Filter in Reports](#)
- [Online help](#)
- [Frequently Asked Questions](#)

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- [How a correct IAS log file looks like](#)
- [How to set up the IAS log file on Windows 2000 Server](#)
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## IAS Log Viewer - Online help

### Using Command Line

IAS Log Viewer can be started in command line mode using additional parameters. This command line parameters allows generating reports in non-visual mode or export data in other formats or just set input log files for IAS Log Viewer open in visual mode.

All IAS Log Viewer command line parameters can be divided in several groups:

- Parameters that specify input log files. Read detailed information here.
- Parameters that is needed for report generation.
- Parameters that is needed for data export.
- Other parameters.

You can group command line parameters by the following rules:

"iasviewer.exe [input options]" - IAS Log Viewer start in visual mode with automatically log files open.

"iasviewer.exe [input options] [report options]" - IAS Log Viewer start in non-visual for reports generation. If report generation was successful IAS Log Viewer don't enter in visual mode.

"iasviewer.exe [input options] [export options]" - IAS Log Viewer start in non-visual for reports generation. If report generation was successful IAS Log Viewer don't enter in visual mode.

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- [Additional Filter in Reports](#)
- [Online help](#)
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### Articles

- [How a correct IAS log file looks like](#)
- [How to set up the IAS log file on Windows 2000 Server](#)
- [How to configure interim intervals on Windows 2000 Server](#)

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## IAS Log Viewer - Online help

### Opening Log Files Command Line Options

This group of parameters allow s setting opened log files or folders.

#### Option Default Description

Option	Default	Description
-i		Open log files that was set in previous visual session mode
-ia		Open current active log file. Current active log is file that is used to write data in present moment. This parameter will work only when IAS Log Viewer start on the same computer where IAS server and log files are placed.
-iad		Open current active folder with log files. Current active log folder is folder that is used to write data in present moment. This parameter will work only when IAS Log Viewer start on the same computer where IAS server and log files are placed.
-iFileName		Open specified log file. This can be a .log file. If you specify a path or file name that contains spaces after a switch, enclose the path in quotation marks.
-iDir		Open all log files (with .log extension) from folder. If you specify a path that contains spaces after a switch, enclose the path in quotation marks.

Examples:

- "ias viewer.exe -i" IAS Log Viewer start in visual mode and automatically log files open that was opened in previous IAS Log Viewer session.
- "ias viewer.exe -ia" IAS Log Viewer start in visual mode and automatically current log files open.
- "ias viewer.exe -ic:\Ray\sample.log" IAS Log Viewer start in visual mode and automatically c:\Ray\sample.log files open.
- "ias viewer.exe -i" c:\RayServer Logs\iaslog.log" IAS Log Viewer start in visual mode and automatically c:\RayServer Logs\iaslog.log files open.
- "ias viewer.exe -ic:\Ray\sample.log -ic:\Ray\iaslog.log" IAS Log Viewer start in visual mode and automatically open log files c:\Ray\sample.log and c:\Ray\iaslog.log.
- "ias viewer.exe -i" c:\RayServer Logs\" IAS Log Viewer start in visual mode and automatically all log files open from c:\RayServer Logs\.

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- [Online help](#)
- [Frequently Asked Questions](#)

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## IAS Log Viewer - Online help

### Command Line Reporting Options

This parameters group allow s generate reports using command line without visual mode of IAS Log Viewer .

Option	Default	Description
-r		Use previous visual session report parameters
-rdDirName		Set folder for result reports. If you specify a path or file name that contains spaces after a sw itch, enclose the path in quotation marks.
-rt(html xml csv)	-rhtml	Set report type.
-rp(FromDate;ToDate Setting LastHours)	-rpalldata	Set dates interval. Only data that match this interval will be used. One of follow ing list items can be used in this parameter: today, yesterday, currentweek, previosweek, currentmonth, previousmonth, currentyear, alldata or date can be set in m m /d/d/yyyy [H:m m :s s] format. You may using LastHours=value also.
-rr(u;ud;p;pd;rj;cc)	-rru	Set reports. Each IAS Log Viewer report has one or two symbols code: u-Usage; ud-Usage Details; p-Ports; pd-Ports details; rj-Rejects; cc-Concurrent Connects If reports divided by ',' selected types reports can be generated simultaneously. You may define report columns with rr(u:"FieldNames";ud:"FieldNames"...) w here FieldNames is report columns divided ',' list
-rod(+)	-rod-	Off/On flag Domain sensitive in login nam e. This flag force IAS Log Viewer take into account domain name in reports generation. For example, if this flag is set to ON users Test\Ray and TestDomain\Ray detected as different and if this flag is set to OFF they detected as as similar.
-roc(+)	-roc-	Off/On flag Case sensitive in login nam e. This flag force IAS Log Viewer use register in user names. For example, if this flag is set to ON users "Ray" and "ray" detected as different and if this flag is set to OFF they detected as similar.
		Set path to xsl stylesheet files. Link

30/7/2014

## Command Line Reporting Options - DeepSoftware.com

-roxsl"PathToXSL"	to xsl stylesheet can be placed automatically in result xml files during xml report generation. This link is <code>&lt;?xml-stylesheet type="text/xsl" href="PathToXSL"?&gt;</code> where instead of PathToXSL must be parameter.
-rf"Filter"	Set additional parameter that filter connects. Only filtered connects will be used for report generation. For example, you can set filter "Login Name like "%ray%"" and generate reports only for users that have "ray" text in its logins.
-rc"ConfigurationName"	Use configuration "ConfigurationName" for report generation. Reports configuration allows saving the most frequently used reports parameters and use them in future. Configuration setting, creation and modification performed in visual mode using <a href="#">"Report wizard"</a> dialog.
-rrcci"interval"	Set interval for Concurrent report generation. Interval format is "[days] H:m:s".

## Examples:

- "iasviewer.exe -ia -r" Reports generation by active log file. All parameters is taken from previous visual mode session of IAS Log Viewer.
- "iasviewer.exe -ia -rru;ud -rd"c:\HTML Logs"" Usage,UsageDetails reports generation by active log file. Generated html reports will be placed in c:\HTML Logs\ folder.
- "iasviewer.exe -ia -rp11/01/2003;11/03/2003 -rru;ud -rtxml -rdc:\XMLLogs"" Usage,UsageDetails report generation by active log file from 1-nov-2003 to 03-nov-2003. Generated xml reports will be placed in c:\XMLLogs\ folder.
- "iasviewer.exe -ia -rp;pd -rd"c:\HTML Logs\" -rhtml -rp"11/01/2001 13:35:00;11/28/2001 13:33:00" -rf"UserName like 'ren%' or UserName like 'far%"" Ports,PortsDetails reports generation by active log file from 1-nov-2001 13:35 to 28-nov-2001 13:33. Reports for users that has "ren" or "far" text in logins will be generated. Generated html reports will be placed in c:\HTML Logs\ folder.
- "iasviewer.exe -i -rru;ud:" Start DateTime, user name";cc -rd"c:\HTML Logs\" -rrcci"1 0:00:00"" Usage,UsageDetails,Concurrents reports generation by log files that was opened in previous visual session of IAS Log Viewer. Usage Details report has 2 columns Start DateTime and user name. Concurrents report has one day interval. Generated xml reports will be placed in c:\XMLLogs\ folder.
- "iasviewer.exe -i"C:\WINNT\system32\LogFiles\iaslog.log" -rc"TestConfiguration"" Reports generation by C:\WINNT\system32\LogFiles\iaslog.log log file. All reports parameters are taken from "TestConfiguration".

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- [Revision History](#) **RSS**
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- [Online help](#)
- [Frequently Asked Questions](#)

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## IAS Log Viewer - Online help Command Line Exporting Options

This parameters group allow s starting data export using command line without visual mode of IAS Log Viewer

Option	Default	Description
-es(r c)	-esc	Set export data type. IAS Log Viewer can export records (parameter -esr) or connects (parameter -esc).
-et(xml csv)	-etxml	Set result data type. IAS Log Viewer can export data in xml or csv formats.
-edFileName		Set file name where data will be exported. If you specify a path or file name that contains spaces after a switch, enclose the path in quotation marks.
-ef"Field[,Field]" v		Set export fields list and its order. -efv parameter must be used for getting fields list and order from visual mode.
-eodChar	-eod;	Set data separator symbol for export in csv format.
-eoh(+ -)	-eoh+	On/off header with field names for export in csv format.
-ep(FromDate;ToDate[Setting]LastHours)	-epalldata	Set dates interval. Only data that match this interval will be export. One of following list items can be used in this parameter: today, yesterday, currentweek, previousweek, currentmonth, previousmonth, currentyear, alldata or date can be set in mm/dd/yyyy [H:m m :s s] format. You may using lasthours=value also.

### Examples:

- "iasviewer.exe -ia -edc:\connects.xml" Connects export in xml format from active log file into c:\connects.xml file.
- "iasviewer.exe -ic:\IASLogFiles -esc -etcsv -edc:\connects.csv" Connects export in csv format from folder c:\IASLogFiles into file c:\connects.csv.
- "iasviewer.exe -i"C:\WINNT\system32\LogFiles\iaslog.log" -edc:\connects.xml -ef"Login Name, Duration, Input Octets, Output Octets"" Four fields export from file C:\WINNT\system32\LogFiles\iaslog.log in xml format into c:\connects.xml file
- "iasviewer.exe -ia -edc:\connects.xml -eptoday" Current day connects export in xml format from active log file into c:\connects.xml file.
- "iasviewer.exe -ia -edc:\connects.xml -ep"01/01/2005;01/15/2005"" Connects export in period of time from 01/01/2005 to 01/15/2005 in xml format from

30/7/2014

## Command Line Exporting Options - DeepSoftware.com

active log file into c:\connects.xml file.

- "iasviewer.exe -ia -edc:\connects.xml -ep"01/01/2005 3:00:00;01/15/2005 23:00:00" Connects export in period of time from 01/01/2005 3am. to 01/15/2005 11pm.in xml format from active log file into c:\connects.xml file.

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## IAS Log Viewer - Online help

### Command Line Other Options

Additional command line parameters

Option	Default	Description
-fFileName		Specify command line parameters file. Command line parameters must be placed in different lines of that text file. If you specify a path or file name that contains spaces after a switch, enclose the path in quotation marks.
-? -h		Show s brief help for all command line parameters
-nosplash		Disable splash screen that show s during IAS Log Viewer startup.

Examples:

- "iasviewer.exe -f"c:\Program Files\IAS Log Viewer\params.txt" Where params.txt file has the follow ing text:  
-ia  
-rd"c:\temp\logs\output"  
-rhtml  
-rru;ud  
-rf"UserName like '%ray%'"

"Usage,UsageDetails" html report generation by active log file. Reports will be generated for filtered users that have "ray" text in then name. Generated html reports will be placed in c:\temp\logs\output\ folder.

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This is **Exhibit "B"** referred to in the  
affidavit of **Steven Rogers**, sworn before me  
this 31 day of July, 2014.



---

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**DALEEN VAN DYK**  
A Notary Public in and for  
The Province of Nova Scotia

Court File No. T-2058-12

FEDERAL COURT

BETWEEN:

VOLTAGE PICTURES LLC

Plaintiff

and

JOHN DOE and JANE DOE

Defendants

FORM 52.2

Rule 52.2

CERTIFICATE CONCERNING CODE OF CONDUCT FOR EXPERT WITNESSES

I, Steven Rogers, having been named as an expert witness by Voltage Pictures LLC, certify that I have read the Code of Conduct for Expert Witnesses set out in the schedule to the Federal Court Rules and agree to be bound by it.

(Date)  
July 31, 2014



(Signature of expert witness)

(Name, address, telephone, and fax number of expert witness)

Steven L. Rogers  
400 Queens Ave., London, Ontario N6B 1X9  
519-471-4120

VOLTAGE PICTURES LLC  
Plaintiff

and

JOHN DOE and JANE DOE  
Defendants

---

FEDERAL COURT OF CANADA

Proceeding commenced at Toronto

---

AFFIDAVIT OF STEVEN ROGERS  
(Sworn on July 31, 2014)

---

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Lawyers for the Plaintiff,  
VOLTAGE PICTURES LLC

Court File No. T-2058-12

**FEDERAL COURT**

**BETWEEN:**

**VOLTAGE PICTURES LLC**

Plaintiff

**and**

**JOHN DOE and JANE DOE**

Defendants

**AFFIDAVIT OF JOHN PHILPOTT**

(Sworn on July 31, 2014)

I, **JOHN PHILPOTT**, of the City of Toronto, in the province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am an associate of the law firm Brauti Thorning Zibarras LLP (“BTZ”), counsel for the Plaintiff Voltage Pictures LLC (“Voltage”) and, therefore have knowledge of the matters within these proceedings. Where I do not have personal knowledge, I have stated the source of my information and believe it to be true.

*Teksavvy Facilitates the Unauthorized Reproduction and Distribution of Copyrighted Material*

2. Voltage, a movie production company, commenced the herein action to recover damages from the unauthorized reproduction and distribution of its copyrighted cinematographic works through the internet.

3. With the assistance of a forensic investigation services company, Voltage was able to identify a significant number of Internet Protocol (“IP”) addresses used to copy and distribute Voltages’ copyrighted work. By virtue of the anonymity of the internet, Voltage was unable to identify the specific names and addresses of the defendants, and named them as John and Jane Doe for the purposes of initiating the proceeding.

4. IP addresses are assigned to individual internet users by their Internet Service Provider (“ISP”). Accordingly, these ISPs are the only entities with the ability to identify the names and addresses of the individual internet users that used the IP addresses at any given time. The particular IP addresses identified by Voltage were all located in Ontario and were assigned by the ISP Teksavvy Solutions Inc. (“Teksavvy”). Accordingly, in order to identify the names and addresses of the individual defendants in the herein action, Voltage required the information in Teksavvy’s possession.

***Teksavvy forces Voltage to bring the Rule 238 Motion***

5. At all times during the herein action, and even prior to its initiation, Teksavvy maintained that it would not provide the contact information of individuals whose IP addresses were used in the authorized copying and distribution of Voltage’s films over the internet without a court order. For example, as of August 29, 2012, approximately three months before the herein action was initiated, Teksavvy’s Privacy Policy, contained on its website, stated the following in the Questions and Answers section:

Our general policy is not to provide personal information to any party outside of the Teksavvy Companies. However, there are certain limited circumstances, outlined below, in which it is necessary to do so.

...

Third parties to whom we may have to provide personal information include:

Law enforcement agencies, in emergencies, for internal security matters, or where required by court order or warrant.

A copy of the screenshot of Teksavvy's Privacy Policy, dated August 29, 2012, is attached hereto as **Exhibit "A"**.

6. By virtue of Teksavvy's position, Voltage was forced to bring the Rule 238 motion to compel Teksavvy to provide the information necessary to further its claim. Despite this position, Teksavvy, at no point, ever indicated that it opposed Voltage's Rule 238 motion. Teksavvy maintained this position through the 7 months leading up to and at the Rule 238 motion heard on June 25<sup>th</sup>, 2013.

#### *The Proceedings*

7. On November 1, 2012, Voltage, through its counsel, James Zibarras ("Zibarras"), provided TekSavvy with Voltage's draft motion record for its Rule 238 motion, proposing a hearing date for November 19, 2012. A copy of the email sent by Zibarras to TekSavvy's then counsel, enclosing the draft materials, is attached as **Exhibit "B"**.

8. From the beginning, Teksavvy took the position that it would not deliver up any customer names without a Court order. On November 13, 2012, Teksavvy's counsel, Christian Tacit ("Tacit"), sent an email to Zibarras stating:

TSI will take the position that no disclosure of end user data should occur without appropriate privacy safeguards for the end users affected. TSI will also [sic] for the exclusion of a large number of IP addresses that it can simply not correlate to end users as a technical matter.

A copy of this email is attached hereto as **Exhibit "C"**.

9. Teksavvy did not indicate whether November 19, 2012 would be agreeable for the motion date.

***Teksavvy Retains External Counsel for the Unopposed Motion***

10. Despite already providing its position regarding the Rule 238 motion, on November 14, 2012, Teksavvy retained outside counsel for the Rule 238 motion, Nicholas McHaffie (“McHaffie”) from Stikeman Elliot, “with respect to the litigation aspect of this file”. At no point was Teksavvy a party to the litigation, and it never changed its position of not opposing the motion. A copy of the email from Tacit, dated November 14, 2012, is attached hereto as **Exhibit “D”**.

***Teksavvy’s Unnecessary Steps***

11. On November 14, 2012, McHaffie telephoned Zibarras and me to advise that TekSavvy wished to adjourn the motion so that they could provide notice of the motion to their affected customers. This was the first time Teksavvy indicated that it wanted to provide notice to its customers.

12. After our phone call, I emailed McHaffie stating, *inter alia*, that Teksavvy’s position that their customers were required to be provided with notice by TekSavvy was without any basis in law. I requested McHaffie’s authorities in support of his position that providing notice to customers was required, or even recommended, by law. A copy of my email to McHaffie, dated November 14, 2014, is attached as **Exhibit “E”**.

13. On Thursday, November 15, McHaffie provided a number of cases he believed stood for the general proposition that a party affected by a motion ought to be given notice of it. However,

he was unable to provide any authorities to support his position that notice was required in the context of a *Norwich* type order. As stated in his email:

...a motion may be brought without such notice, as in past cases seeking equitable bills of relief, such as *BMG*, this appears to have been the approach taken (or at least the issue was not addressed). However, *I do not read such cases* as standing for the proposition that notice is neither necessary nor desirable where it can reasonably be effected.

McHaffie then stated that TekSavvy had already begun retrieving the client information relevant to the Rule 238 motion, even prior to being served Voltage's motion materials, but that it still required further details from Voltage. McHaffie advised that once it was provided with the further details, it would then require an additional 10-15 business days. A copy of the emails from McHaffie, dated November 15, 2012, are attached hereto as **Exhibit "F"**.

14. On November 16, 2012, I responded to McHaffie's email agreeing to postpone the Rule 238 motion for an additional 16 days to December 3, 2012 and that Voltage would provide the additional information TekSavvy requested. I also stated the following:

We do not agree that TekSavvy's customers are entitled to notice of this motion and it remains exactly unclear what providing notice will achieve, given that individuals who appear at the motion will have fulfilled the purpose of the motion by identifying themselves. That said, it also remains our position that we would like to work cooperatively with TekSavvy, provided that it does not delay or otherwise prejudice our client.

In addition, we also requested the following paragraph be included in the notice letters that would be sent to TekSavvy's customers:

The lawyers for Voltage Pictures LLC have required us to inform you that, until this matter is resolved, you are on notice to preserve any and all hard drives or other means of electronic storage associated with your above referenced IP address and to take no steps whatsoever to remove, erase, discard, conceal, destroy or deleted from any means of electronic storage any evidence of piracy

and/or other illegal downloading and distribution of Voltage Picture LLC's intellectual property. In the event that it is determined that, through computer forensic evidence of 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.

A copy of the November 16, 2012 email is attached hereto as **Exhibit "G"**.

15. On November 19, 2012, McHaffie responded to my November 16 email, stating that the proposed December 3 date was not acceptable:

Unfortunately, a December 3 return date doesn't allow enough time to both get the necessary information together and give TekSavvy's customers enough notice of the date to make the exercise worthwhile. However, if you are prepared to move the return date to December 10, then TekSavvy is prepared to make efforts to get the notice out in time for its customers to have a meaningful opportunity to respond. It strikes me that this extra week should not be a sticking point and should allow the parties to move forward.

A copy of McHaffie's email, dated November 19, 2012, is attached hereto as **Exhibit "H"**.

16. On November 21, 2012, I advised we would agree to a December 10 return date, but reiterated:

Regarding TekSavvy's "level of engagement", the steps that TekSavvy is contemplating taking are entirely on its own volition and, as you know, our position is that this is unnecessary.

I advised McHaffie that Voltage would provide TekSavvy with the information it required to send its customers notice shortly. I then asked McHaffie if he would have time the next day to discuss. A copy of my November 21, 2012 email is attached hereto as **Exhibit "I"**.

17. McHaffie did not respond to my November 21 email or request for a phone call until November 26, 2012, stating that he was "tied up on other matters late last week and couldn't get

back to” me. A copy of McHaffie’s email, dated November 26, 2012 email is attached hereto as **Exhibit “J”**.

*TekSavvy Processes the IP Addresses in 4 Days*

18. On November 28, 2012, I provided McHaffie with the data file containing the 2114 IP addresses that were the subject of the Rule 238 motion so TekSavvy could fulfil its desire to notify its customers. A copy of my email (without the attachments), dated November 28, 2012, is attached as **Exhibit “K”**.

19. On November 29, 2012, I advised McHaffie that Voltage was not amenable to further delays and intended to proceed with the December 17, 2012 motion. A copy of my email, dated November 29, 2012, is attached hereto as **Exhibit “L”**.

20. In his June 27, 2014 affidavit, Marc Gaudrault (“Gaudrault”), TekSavvy’s CEO, stated that TekSavvy completed the IP address correlation on December 4, 2012. This was 4 business days from the time I provided the data file containing 2114 IP addresses to TekSavvy.

*Voltage and TekSavvy Cooperate to Send Notice to TekSavvy’s Customers*

21. On Sunday, December 9, 2012, McHaffie sent us a draft of the email that TekSavvy intended to send to its customers regarding notice. A copy of the email, dated December 9, 2012, is attached hereto as **Exhibit “M”**.

22. That same day, I responded to McHaffie’s email with some minor suggestions for revisions for the draft. I also commented on TekSavvy’s recent addition to its website covering

“Copyright Law in Canada”, noting that overall it was fair and balanced, but stating the following:

However, on that same theme, we would ask that the link to Michael Geist’s article and the link to CIPPIC be removed. This is our primary concern. Mr. Geist’s article is quite speculative and could potentially mislead TekSavvy’s customers about the state of the law. For example, the statutory damages section of the amended Copyright Act is not yet in force and has not been subject to jurisprudence, yet Mr. Geist postulates that Courts will award far less damages at the low end of the scale (ignoring the test for assessing statutory damages, including the emphasis that Courts place on deterrence). Whether this forecast ultimately turns out to be accurate is not the issue. Rather, the problem is that Mr. Geist has nothing to base his prediction on. Without any Canadian examples, he simply assumes that demand letters will be sent out asking for hundreds of thousands of dollars. In this, Mr. Geist is seeking to paint the lawful acts of rights holders as something nefarious. As well, Mr. Geist’s article and the Hansard quotes he’s selectively included are solely in regard to downloading, whereas our claims are based on uploading and distributing. The same critiques are applicable to many elements of the CIPPIC website, which refers to the lawful act of rights-holders as a “scheme”.

TekSavvy’s customers will be better served if only the Government’s website is linked. A customer who reads the CIPPIC page and Geist’s article may be persuaded that they will not be sued. Once they are in fact subject to litigation, they could be displeased with the information that they were provided with by TekSavvy.

A copy of my email, dated December 9, 2012, is attached hereto as **Exhibit “N”**.

23. After a series of additional emails, McHaffie confirmed that notice was sent to its customers on Monday, December 10 at approximately 2:25 p.m. A copy of McHaffie’s email, dated December 10, 2012, is attached hereto as **Exhibit “O.”**

24. Voltage filed its motion record for the Rule 238 motion on December 11, 2012.

*CIPPIC Seeks Intervener Status*

25. On December 14, 2012, just three days before the December 17 Rule 238 motion, we received a fax from David Fewer (“Fewer”), the director of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (“CIPPIC”). Fewer advised that CIPPIC would be seeking intervener status in the Rule 238 motion, but given that the motion was set to commence in five days, it would first be seeking an adjournment of the Rule 238 motion to allow it time to file materials to seek intervener status. A copy of the facsimile, dated December 14, 2012, is attached hereto as **Exhibit “P”**.

26. CIPPIC simultaneously sent the facsimile described above to the Federal Court without consulting or providing any notice to Voltage.

*TekSavvy Seeks a Further Adjournment on the Eve of the Motion*

27. On December 16, 2012 at 7:02 p.m., the evening prior to the Rule 238 motion, McHaffie informed me via email that TekSavvy also wished to adjourn the motion. This was the first time TekSavvy indicated it would seek an adjournment of the December 17 motion date. A copy of McHaffie’s email, dated December 17, 2012, is attached hereto as **Exhibit “Q”**.

28. On December 17, at 8:24 a.m., McHaffie sent a further email stating that the basis for seeking the adjournment was that TekSavvy made errors correlating some of the IP addresses that it processed manually. According to the email, TekSavvy incorrectly sent notices to 42 customers that should not have received notifications and failed to notify 92 customers that it had intended to notify. It requested additional time to send further notices. A copy of McHaffie’s email, dated December 17, 2012, is attached hereto as **Exhibit “R”**.

*The December 17, 2012 Motion Date is Adjourned at TekSavvy and CIPPIC's Request*

29. On December 17, 2012, Voltage, TekSavvy and CIPPIC attended the motion before the Federal Court. Both TekSavvy and CIPPIC sought an adjournment.

30. An adjournment was granted solely on the basis of CIPPIC's request to intervene. One of the primary grounds put forward by TekSavvy for the adjournment was that it had made an error in processing the IP addresses and wanted more time to provide notice to its customers. The Court stated that "no finding is being made with respect to any requirement of Notice to Potential defendants." The motion was adjourned to the first next available date, January 14, 2013. A copy of the Order of Justice O'Keefe, dated December 19, 2012, is attached as **Exhibit "S"**.

31. Gaudrault attended the December 17, 2012 motion and remained after to answer questions from the press.

*The January 14, 2013 Motion Date is Adjourned at TekSavvy and CIPPIC's Request*

32. Despite having approximately a month to prepare materials, CIPPIC returned on the January 14, 2013 motion date without any materials or formal submissions for seeking intervener status. CIPPIC simply sought another adjournment of the motion. TekSavvy similarly argued for an adjournment, simply by supporting CIPPIC's position that it still desired to intervene, as it had completed sending out the notice emails to its customers.

33. The Rule 238 motion was adjourned *sine die* to allow the parties to submit written motion materials regarding CIPPIC seeking leave to intervene. A copy of the Order of Justice Mandamin, dated January 18, 2013, is attached hereto as **Exhibit "T"**.

*CIPPIC is Granted Intervener Status*

34. Both CIPPIC and Voltage submitted materials for CIPPIC's motion in writing regarding CIPPIC's leave to intervene. TekSavvy did not submit any materials.

35. On February 13, 2013, CIPPIC was granted intervener status permitting CIPPIC to perform the following functions with respect to the Rule 238 motion:

- a) Produce affidavit evidence and cross-examine the Plaintiff's affiant;
- b) Make arguments on points of law; and
- c) Be served with all materials filed for the Rule 238 Motion.

*TekSavvy does not Participate in Cross-Examinations*

36. On June 5, 2014, Barry Logan, Voltage's affiant for the Rule 238 motion, was cross-examined by CIPPIC. TekSavvy attended as a spectator, even though it wasn't required to attend and did not pose a single question to the affiant.

37. On June 6, 2014, Timothy Lethbridge, CIPPIC's affiant for the Rule 238 motion, was cross-examined by Voltage. Again, TekSavvy attended as a spectator, even though it wasn't required to attend and took no position on the motion. TekSavvy again did not pose a single question to the affiant.

38. TekSavvy never filed any materials for the Rule 238 motion. Accordingly, no affiants for TekSavvy were cross-examined for the Rule 238 motion.

*The June 25, 2013 Rule 238 Motion*

39. On June 25, 2013, the Rule 238 motion was heard. The moving party was Voltage. The opposing party was CIPPIC. TekSavvy had no involvement in the motion.

40. Gaudrault attended the June 25, 2013 motion and remained after to answer questions from the press.

41. CIPPIC opposed Voltage's motion on the following grounds:

- a) The right to privacy is implicitly protected under sections 7 and 8 of the Charter of Rights and Freedoms; and
- b) The herein litigation was, in fact, "merely a business model to coerce payment from individuals who do not wish to incur the costs of defending a lawsuit and would rather pay something to an entity such as Voltage than to pay lawyers."

Both of these arguments were rejected by the Court. A copy of the Decision of Prothonotary Aalto, dated February 21, 2014, is attached hereto as **Exhibit "U"**.

42. As TekSavvy did not oppose the Rule 238 motion and did not file any materials, it was not in a position to make any formal submissions at the hearing and did not make any material submissions. The majority of the motion was spent between submissions from counsel for Voltage and CIPPIC.

43. I have sworn this affidavit in support of Voltage's motion and for no improper purpose.

SWORN BEFORE ME at the City of  
Toronto, in the Province of Ontario,  
this 31<sup>st</sup> day of July, 2014



A Commissioner of Oaths, etc.

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**JOHN PHILPOTT**





INDEX

	PAGE
SWORN: BARRY LOGAN	4
CROSS-EXAMINATION BY MR. MCHAFFIE	4
RE-EXAMINATION BY MR. ZIBARRAS	159

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LIST OF UNDER ADVISEMENTS

Under Advisements (U/A) found at pages: 98, 126,  
143

\*\*\*\*\*

LIST OF EXHIBITS

NO.	DESCRIPTION	PAGE
1	E-mail thread between Mr. Logan and Mr. Misur	122
A	Documents related to Rogers, Bell, and Telus websites (for identification)	123

\*\*\*\*\*

1 Toronto, Ontario  
 2 --- Upon commencing on Thursday, October 9, 2014  
 3 at 1:15 p.m.  
 4 SWORN: BARRY LOGAN  
 5 CROSS-EXAMINATION BY MR. MCHAFFIE:  
 6 1 Q. Good afternoon,  
 7 Mr. Logan, and thank you for attending today. You  
 8 have in front of you a copy of your affidavit  
 9 sworn July 30, 2014 I see?  
 10 A. Yes, that's correct.  
 11 2 Q. And you are the owner and  
 12 principal forensic consultant of Canipre? Am I  
 13 pronouncing it right?  
 14 A. Yes, sir.  
 15 3 Q. I've heard a couple, so  
 16 I'm glad I got that. And prior to preparing this  
 17 affidavit, you had reviewed the affidavits of  
 18 Mr. Gaudrault, Mr. Tellier, and Mr. Aube?  
 19 A. Correct.  
 20 4 Q. And in your affidavit  
 21 evidence you provided evidence -- just generally  
 22 speaking -- on some -- a factual background  
 23 matters, and some discussion that you have entered  
 24 into, but also your opinion on certain issues?  
 25 A. Yes, I don't think

1 that issue, to the degree to which there is  
 2 internet piracy in Canada, does not affect the  
 3 costs that TekSavvy has incurred in responding to  
 4 Voltage's request for information? That's fair to  
 5 say?  
 6 A. No, I think actually it  
 7 does, it provides some background, some historical  
 8 look into piracy in Canada. So I think it's very  
 9 relevant to the bigger picture of what we're  
 10 actually here talking about today.  
 11 9 Q. So then how does it  
 12 affect what costs TekSavvy incurred in correlating  
 13 a list of IP addresses to a list of customer  
 14 names? How does the prevalence of internet piracy  
 15 affect that in anyway?  
 16 A. Well, if you look at  
 17 internet piracy, I mean, I go back to 2000, which  
 18 is, you know, a good chunk of time in internet  
 19 years. The picture of piracy and how it relates  
 20 to the IP addresses is that without understanding  
 21 the background, you wouldn't understand how it is  
 22 that TekSavvy has marketed to the piracy issue.  
 23 10 Q. And how does TekSavvy's  
 24 marketing affect the cost that it incurred to  
 25 correlate IP address information given by Voltage

1 there's any opinion in here.  
 2 5 Q. Okay, so issues, for  
 3 example, on acceptance of piracy affecting the  
 4 ability of rights holders, and your views on the  
 5 impact of piracy, your views on the environments  
 6 that are created, and those sorts of things you're  
 7 saying you're not giving opinion evidence in -- on  
 8 any of this?  
 9 A. I think we're mixing two  
 10 different things here. There may be some quotes  
 11 taken from reports, so they wouldn't be my  
 12 opinions.  
 13 6 Q. Okay. But you're not  
 14 purporting to -- let me just back it right out.  
 15 You're not purporting to give any opinions to the  
 16 Court based on your own expertise or knowledge?  
 17 A. No, sir.  
 18 7 Q. Okay. If you can look  
 19 then starting at paragraph 2, you have a heading  
 20 "Backward - The Widespread Prevalence of Internet  
 21 Piracy in Canada". And I take it that that  
 22 heading is intending to cover paragraphs 2 through  
 23 8 of your affidavit?  
 24 A. That's correct, yes.  
 25 8 Q. And it's fair to say that

1 to information in its systems relating to  
 2 customers? How does that affect that in anyway?  
 3 A. The charges that TekSavvy  
 4 has advanced as being the cost to reconcile an IP  
 5 to a subscriber is also including the marketing in  
 6 sales and corporate promotion of that company,  
 7 TekSavvy, to the internet user base here in Canada  
 8 at large. So that --  
 9 11 Q. So you're talking --  
 10 you're talking prior to December 10? You're  
 11 talking back to 2000?  
 12 A. Sorry, I'm not clear on  
 13 the question.  
 14 12 Q. Are you talking about --  
 15 are you talking about anything undertaken by  
 16 TekSavvy prior to November 1, 2012?  
 17 A. No, I'm talking about  
 18 subsequent to the filing of this claim forward.  
 19 13 Q. Okay. In particular, you  
 20 are saying -- you're talking about -- here let me  
 21 just line it up. You're not talking about  
 22 anything dealing with the technical side of the  
 23 actual correlation of IP addresses to usernames,  
 24 you're not talking about?  
 25 A. It was actually very

Page 7	Page 9
<p>1 difficult to discern the technical aspects of what 2 was actually done on the charges that were 3 advanced to us. Go ahead. 4 14 Q. So, no, I don't want to 5 interrupt. Please. 6 A. No, the technical side -- 7 I'm not speaking to the technical side. 8 15 Q. Okay. So what you're 9 saying then, you say that the prevalence of 10 internet piracy in Canada is relevant to the 11 amount of time then that's spent on the operation 12 side of TekSavvy in response to the request by 13 Voltage? 14 A. No, I think the 15 importance of the -- the historical side here at 16 the first eight paragraphs of my affidavit, is to 17 provide the background and history of what -- the 18 seriousness of the piracy issue in Canada. Some 19 of the reports speak to consecutive years of 20 Canada being in issue. They continue today to 21 have reports labelling Canada as a, you know, a 22 top three or a top five country for commercial and 23 end-user piracy. 24 Our own experiences at 25 Canipre, collecting and assessing data, supports</p>	<p>1 careful if you're going to say, "I'm only giving 2 factual evidence to the Court, I'm not an expert." 3 A. I would agree with that. 4 I don't think it's obvious, I think it's what has 5 been done. 6 17 Q. And you, I think, in your 7 last response, put your finger on the nub when you 8 said, "I don't know how they come to that." 9 You're not the author of any of these reports, the 10 Special 301 Reports? 11 A. No, the Special 301 12 Report is regarded worldwide as an authority on 13 piracy in different territories around the world. 14 18 Q. Right. But in terms of 15 how they come to the numbers in them -- 16 A. I wasn't -- 17 19 Q. -- you can't speak to 18 that, and weren't a part of that? 19 A. I wasn't involved in the 20 preparation of it, no. 21 20 Q. And to the extent that 22 people agree or disagree with the outcome of that 23 report, we can't grill you, as it were, on where 24 these numbers come from, where that -- you know, 25 whether this is a fair or not fair conclusion of</p>
Page 8	Page 10
<p>1 that Canada is also a country that, you know, is a 2 concern for piracy. So the history is very 3 important to understand piracy in Canada. You 4 know, for example, I think one of the reports 5 states that Canadians download three times as much 6 music as the -- as Americans. I don't know how 7 they come to that, I'm just quoting, you know, a 8 sentence in that report. 9 So, yes, history is very 10 important in understanding the complete picture 11 here. And because there is a great worldwide 12 interest in this very issue, in the very topic, 13 and it seems obvious that TekSavvy has decided to 14 market -- 15 16 Q. Sorry, again, I think I 16 understood you to say that you were not going to 17 give your opinion to the Court, and that was not 18 part of the evidence that you've given. So in 19 terms of your -- what you consider to be obvious, 20 that TekSavvy -- as to what TekSavvy's intentions 21 are, I think we're definitely getting into opinion 22 evidence. 23 If you're now going to say, 24 "I'm going to give expert evidence", we can start 25 talking about that, but I think we have to be very</p>	<p>1 these people, you're just sort of saying, "This is 2 the opinion of other people, and from a factual 3 perspective I'm providing you with the opinion of 4 other people"? That's fair? 5 A. Well, no. I believe that 6 the USTR is using fact-based data, so I don't 7 think their report is opinion, I think it's based 8 on facts that have been collected, if I understand 9 how they have collected their data. 10 21 Q. Okay. So, for example, 11 if you look at number 5, paragraph 5, and from one 12 of the 301 reports, it says: 13 "A report released in 14 September 12, 2012, found 15 that on a per capita 16 basis Canadians download 17 more unauthorized music 18 than residents of any 19 other country, and two 20 and a half times as much 21 as Americans." (As read) 22 I thought I understood you to 23 say, "I don't know how they come to that." 24 A. Well, I don't, I can't 25 tell you specifically what they have done, and</p>

1 collected, and looked at, assessed, measured, or  
2 calculated, I don't know what formulas they've  
3 used. That would be better off addressed by the  
4 United States Trade Representative's office.

5 22 Q. Very much so.

6 A. Yes.

7 23 Q. Exactly. But I don't --  
8 I can't ask them questions, I can ask you  
9 questions, so I'm just trying to figure out what I  
10 can and can't ask.

11 A. We can probably get you  
12 in touch with them.

13 24 Q. Paragraph 6, just at that  
14 last sentence you say:

15 "IP addresses are the  
16 unique identifiers  
17 assigned to individual  
18 internet users by their  
19 ISP." (As read)

20 It's fair to say that an IP  
21 address is actually not assigned to an individual  
22 user, it's assigned to a device?

23 A. Correct.

24 25 Q. Right. And that one user  
25 may use more than one device?

1 proceeding?

2 A. I think I've had that  
3 conversation with multiple rights holders in  
4 Canada from producers to financiers, distributors,  
5 creators, screen writers, here in Canada. Voltage  
6 Pictures I've not had that conversation with.

7 30 Q. And, again, in terms of  
8 the --

9 A. I think the key word in  
10 that paragraph 7 is the word "acceptance".

11 31 Q. Okay. In paragraph 8,  
12 again, the IIPA 2013 Special Report, you are not  
13 an author of that report?

14 A. No, I'm not the author of  
15 that report.

16 32 Q. And the -- and in terms  
17 of what the numbers -- where they estimated the  
18 direct consumer spending losses, and the  
19 particular facts on which those are based, you  
20 can't speak to that today?

21 A. I believe that that  
22 section of the report may actually originate from  
23 the Canadian Motion Picture Distributors  
24 Association.

25 33 Q. Okay.

1 A. Correct.

2 26 Q. And one device may be  
3 used by more than one user?

4 A. Correct.

5 27 Q. So it's not -- this isn't  
6 quite properly phrased that last sentence?

7 A. Yeah, I would probably  
8 rephrase that sentence.

9 28 Q. You say in paragraph 7:  
10 "The widespread

11 acceptance of piracy  
12 across Canada greatly  
13 affects the ability of  
14 rights holders to profit  
15 from their products." (As  
16 read)

17 Do you have knowledge of the  
18 degree to which Voltage Pictures itself has  
19 profited from the works that are at issue in this  
20 proceeding?

21 A. I've not asked Voltage  
22 Pictures that specific question, no.

23 29 Q. So here you're just  
24 talking to generalities rather than with respect  
25 to the specific matters at issue in this

1 A. Provided to the  
2 International Intellectual Property Alliance.

3 34 Q. So these are estimates  
4 from the people who are estimating their own --  
5 what they say they have lost, do you know what  
6 facts they are basing that on?

7 A. You'd have to ask the  
8 Canadian Motion Pictures Distributors Association.

9 35 Q. And that's not something  
10 you did for the purposes of your affidavit?

11 A. No.

12 36 Q. And, similarly, you  
13 aren't an author of the study by IPSIS and Oxford  
14 Economics that's cited in that report?

15 A. No.

16 37 Q. Is Voltage a member of  
17 the Canadian Motion Picture Distributor  
18 Association?

19 A. I'm not certain of that,  
20 I have not looked, not asked. Usually my role as  
21 an investigator is limited to the investigation of  
22 people, places, events.

23 38 Q. Okay. But here you've  
24 gone beyond that role to start to talk about  
25 generally the impact of piracy on the motion

1 picture industry in general. That's not your  
2 usual role, that's fair to say?

3 A. No, that's providing  
4 background information, sure, because I provide a  
5 lot of background information on basically  
6 everything that we touch.

7 39 Q. Would you look at talking  
8 about BitTorrent just for clarification. And,  
9 again, you talk about BitTorrent protocol in  
10 paragraphs 9 to 12. BitTorrent is a technology  
11 for file sharing?

12 A. BitTorrent is a  
13 technology for file sharing.

14 40 Q. And the technology is not  
15 dedicated by the contents of the file? It can be  
16 used for a variety of different sorts of file.  
17 That's fair to say?

18 A. That's correct, yeah.

19 41 Q. And if you look, please,  
20 at paragraph 12, you say at the beginning of  
21 paragraph 12 -- and I notice that you've got a  
22 fair number of notes that you've got on your  
23 affidavit. Normally I would ask for production of  
24 any notes that you're referring to during the  
25 course of a cross-examination. For the time

1 unless you intentionally change that  
2 configuration.

3 44 Q. If you look then at --  
4 the section -- the next heading you have is  
5 "TekSavvy is the Ideal Environment to Download  
6 Movies Through the BitTorrent Protocol". I assume  
7 that's a position that you are putting toward --  
8 to the Court based on the paragraphs that then  
9 follow, 13 through 18?

10 A. That is correct, yes.

11 45 Q. Okay. And when you say  
12 in paragraph 13 that, "TekSavvy creates an  
13 environment that encourages its customers to  
14 download movies through the BitTorrent protocol"  
15 (as read), are you talking about Canadian ISPs  
16 generally, or are you talking about TekSavvy as --  
17 in particular as being different from other  
18 Canadian ISPs?

19 A. If we're looking at that  
20 first sentence, we're speaking about TekSavvy.

21 46 Q. Yes, but what I'm saying  
22 is: Are you -- do you distinguish -- in giving  
23 this evidence, do you distinguish between TekSavvy  
24 and other ISPs, or is the information that you've  
25 given here applicable to other ISPs, and one could

1 being, I won't until it sort of gets to where you  
2 are referring to notes. But I'll ask you if at  
3 any time if you're referring to a note that you've  
4 got in your thing in order to answer my question,  
5 I'll ask you to advise me of that, and I'll ask  
6 for a copy of that.

7 A. Certainly.

8 42 Q. So if you look at  
9 paragraph 12, then you say:

10 "Once a packet is  
11 downloaded by a peer,  
12 that peer automatically  
13 becomes a download source  
14 for other peers." (As  
15 read)

16 It's fair to say that that's  
17 something that is configured? You either  
18 automatically become a download source, or you  
19 don't, depending on how the client is configured?

20 A. That's correct.

21 43 Q. So it's not  
22 automatically, it's it can be or it can't be?

23 A. I believe most of them  
24 are default to being -- the setting that you're  
25 referring to, the default as being open, or on,

1 simply make the conclusion about ISPs generally?

2 A. No, this is about  
3 TekSavvy.

4 47 Q. Okay. So you're  
5 effectively saying it creates an environment like  
6 to a greater degree than other ISPs?

7 A. That's correct.

8 48 Q. Okay. So -- and then  
9 that's -- when you talk about the other sections  
10 here, you're suggesting that these are matters  
11 that are peculiar then to TekSavvy, and not to  
12 other ISPs?

13 A. Well, what sections?

14 49 Q. Thirteen through 18.

15 A. I need a minute to go  
16 over them, if I can?

17 50 Q. Absolutely.

18 A. Okay, I'm good enough  
19 here, Mr. McHaffie. So the question was?

20 51 Q. Okay. So looking at, for  
21 example, the first paragraph, paragraph 13, are  
22 you saying that this is a fact and -- in this you  
23 talk about advertising that a movie is 700  
24 megabytes on the TekSavvy website. Have you  
25 reviewed the websites of other ISPs to determine

Page 19

1 whether similar information is put forward by  
2 them?  
3 A. Correct, I have.  
4 52 Q. Yeah. And so you know,  
5 for example, that Telus, for example, refers to  
6 movies as being 700 megabytes as well, Rogers  
7 refers to movies being 700 megabytes as well, Bell  
8 speed check-up refers to movies being  
9 700 megabytes as well?  
10 A. No, I'm not. Are you?  
11 53 Q. Yeah, so I'm putting in  
12 front of you here something from the Connecting  
13 Rogers --  
14 A. Okay, what's the date?  
15 54 Q. The URL is at the bottom  
16 here.  
17 A. Well, that's the URL and  
18 the print date, but what's the date that the  
19 information is current of?  
20 55 Q. July 1, 2013, it says the  
21 date on it there. And it is talking about the  
22 speed -- on the third page of this -- talking  
23 about the speed of Rogers high-speed internet, how  
24 fast is 200 megabytes per second, and it refers --  
25 sorry, I'm on page 3 of 4. How fast is 250

Page 20

1 megabytes per second. And it refers to a number  
2 of things: full-length movie, 700 megabytes, less  
3 than 23 seconds. How fast is 6 megabytes per  
4 second? Full-length movie, 700 megabytes,  
5 16 minutes. So that's something that -- in the  
6 same sort of comparison that TekSavvy does, that  
7 Rogers in its online materials has also done?  
8 A. I would agree with you  
9 that it is done on other -- by a couple of other  
10 internet companies. I think it's the contribution  
11 to the full package that TekSavvy offers and  
12 markets to it's customers that really brings the  
13 issue to the forefront. 700 megabytes is  
14 generally accepted as the average size of a  
15 downloaded movie -- 704 megabytes actually. It  
16 depends on the file format and "dut da dut da da".  
17 56 Q. Okay. So if 700 --  
18 700 megabytes is a commonly accepted number for a  
19 movie?  
20 A. If you were to ask me how  
21 big is a movie to download, I'd say 704 megabytes.  
22 57 Q. Okay. So -- so we've got  
23 Rogers there. Let me just -- just to make sure,  
24 since we're doing this a little bit one at a time,  
25 and if I show you Telus, for example --

Page 21

1 A. Okay. So, again, we have  
2 the print date, we have the URL, we have it  
3 originating -- I would say this is coming from  
4 Telus because I sort of recognize it. It looks  
5 like it's from the Alberta office. I don't know  
6 what the file currency or the content currency is.  
7 58 Q. Okay. Well, we can check  
8 it up online. I can -- the print date, as you  
9 see, is today.  
10 A. It says September 10  
11 oddly, jeez.  
12 59 Q. No, it actually says  
13 October 9, which is today.  
14 A. Okay, yes.  
15 60 Q. 10/9 is October 9. And  
16 if -- we can literally go online with one of the  
17 many devices that are in this room, if it would be  
18 helpful, but just to cut to the chase: You'll  
19 agree that it's fair to say that Telus, another  
20 substantial ISP within Canada, is at least on this  
21 page is talking about internet usage, and one of  
22 the things it describes is downloading a movie at  
23 700 megabytes as --  
24 A. That's what it says, yes.  
25 I think the better question would be: Who

Page 22

1 actually put the information up first? Because it  
2 looks like they've all copied it from each other.  
3 61 Q. Well, if it's a standard  
4 number --  
5 A. Somebody had to come up  
6 with it.  
7 62 Q. Right. Do you know who  
8 came up with 700 megabytes?  
9 A. No, I didn't write for  
10 Telus, Rogers, Bell, or TekSavvy. But the  
11 language is all the same.  
12 63 Q. Well, no, it's not  
13 actually. I mean, if you compare. And nobody is  
14 suing anybody for copyright infringement. But  
15 they use -- it sounds like they use standard  
16 numbers to describe movies when describing the  
17 services that they are providing as an ISP.  
18 That's fair to say?  
19 A. Sure, they're giving me  
20 the reader an idea of how much I can acquire.  
21 64 Q. And that's the -- that is  
22 the goal of that kind of information, is to say  
23 this is how long it will take you to download  
24 this, to give the reader a sense of how long it  
25 would be?

1 A. Sure, yeah.  
 2 65 Q. And those are ISP. And  
 3 that -- just to take it a step back. That's what  
 4 an ISP does, is give an end user access to the  
 5 internet to do whatever they want to do, whether  
 6 it's visit a webpage, upload a picture, download a  
 7 song, stream a video, download a movie, watch an  
 8 hour of Netflix, that's what they do?  
 9 A. Yup, it's the ISP's role  
 10 to remain neutral in that process, and, yeah,  
 11 provide that service.  
 12 66 Q. And so the last one I'll  
 13 just show you is Bell speed check-up.  
 14 A. I'm not familiar with  
 15 Bell speed check-up, so I really can't speak to  
 16 being familiar with any part of Bell.  
 17 67 Q. Okay. So you haven't run  
 18 a Bell speed check-up --  
 19 A. No, I have not.  
 20 68 Q. Okay. And if we were to  
 21 undertake that at the moment -- you know,  
 22 obviously I've shown you a document that you are  
 23 not familiar with, but if I were to take you to a  
 24 Bell speed check-up site, you would be able to  
 25 see, "Okay, yes, I can confirm that's what they

1 assume you are putting forward to support the  
 2 position that you say, "TekSavvy creates an  
 3 environment that encourages its customers to  
 4 download movies through the BitTorrent protocol"  
 5 (as read)?  
 6 A. That was my findings  
 7 through the investigation, yes.  
 8 73 Q. Okay. So -- and the rest  
 9 of the that paragraph, where you're talking about  
 10 "on its website", you say supports that statement?  
 11 A. Yes.  
 12 74 Q. Okay. So let's look at  
 13 Exhibit G.  
 14 A. Okay.  
 15 75 Q. And you'll agree with me  
 16 here that this statement in Exhibit G, what  
 17 150 megabytes per second gets you, and it talks  
 18 about song, video, movie, very similar to what we  
 19 saw on other large ISPs in Canada?  
 20 A. Yeah, I would note that I  
 21 think the 700 -- or the 1,000 megabyte package, I  
 22 didn't look at the package sizes here that were  
 23 being offered, and sold, and promoted, and  
 24 advertised.  
 25 76 Q. Okay. So if you haven't

1 are doing now"? Would that be more helpful if we  
 2 did this online, or are you prepared to say, "I  
 3 agree" -- and really all we're getting to here is  
 4 to just, again, recognize --  
 5 A. It says 700 megabytes per  
 6 movie.  
 7 69 Q. Yeah, yeah. And so in  
 8 other words what I'm saying is TekSavvy, you'll  
 9 agree -- looking at all of this -- TekSavvy is far  
 10 from alone, among Canadian ISPs, in talking about  
 11 the size of a movie, among other files, in putting  
 12 it's services forward to potential customers --  
 13 A. I would agree. There are  
 14 some other statements there I would agree with  
 15 too, but that's not the question.  
 16 70 Q. Now if you look, please,  
 17 at your paragraph -- sorry, at the exhibit that  
 18 you attach in support of this point, that you are  
 19 encouraging people to download movies through the  
 20 BitTorrent protocol.  
 21 A. Okay, we are at...?  
 22 71 Q. Paragraph 13 still.  
 23 A. Thirteen.  
 24 72 Q. You're saying -- the  
 25 information that you give in the rest of 13, I

1 looked at them I don't want to get too far into  
 2 stuff you haven't looked at.  
 3 A. I did look at this one  
 4 though.  
 5 77 Q. Okay, gotcha.  
 6 A. And I know the 1,000  
 7 megabytes to me is saying 200 films -- 200 movies  
 8 a month.  
 9 78 Q. Where does it say 200  
 10 movies a month?  
 11 A. Well, if you look -- we  
 12 just talked about the 700 megabyte files --  
 13 79 Q. Right.  
 14 A. -- we take the 1,000  
 15 gigabytes -- sorry.  
 16 80 Q. All it says is 1,000  
 17 megabytes equals 1 gigabyte. Right?  
 18 A. I made a mistake, I'm  
 19 mistaken.  
 20 81 Q. Okay. So it doesn't say  
 21 you download X number of movies a month, and it  
 22 also doesn't refer to BitTorrent at all. That's  
 23 fair to say?  
 24 A. It doesn't refer to  
 25 streaming either.

1 82 Q. Right. It doesn't refer  
2 to any particular technology?  
3 A. It doesn't even refer to  
4 logging on.  
5 83 Q. And it doesn't refer to  
6 where you download the movie from, whether it's a  
7 peer-to-peer site versus anything else?  
8 A. It doesn't even refer to  
9 Google.  
10 84 Q. Right. Okay. So when  
11 you say "TekSavvy creates an environment that  
12 encourages its customers to download movies  
13 through the BitTorrent protocol" --  
14 A. Yes.  
15 85 Q. -- there is nothing on  
16 this page that is either different from what other  
17 ISPs are doing, or that directly encourages a user  
18 to download a BitTorrent movie in particular?  
19 That's fair to say?  
20 A. The pages, the exhibits,  
21 and the descriptions that I've talked about in  
22 paragraphs 13 to 18, I think it was --  
23 86 Q. Mm-hmm.  
24 A. They go to the complete  
25 marketing of the TekSavvy service.

1 you've referred to that. I'm just going to say --  
2 again, I'm trying to do one page at a time. So  
3 you're saying, "Well, it does say you have a  
4 discussion forum, and by that that's encouraging  
5 people to download a BitTorrent", or are you just  
6 sort of saying, "There is a link there" --  
7 A. No, I would just like to  
8 point out the fact that TekSavvy has a discussion  
9 forum on this particular page, this Exhibit G.  
10 92 Q. Okay. Okay. Other than  
11 that then, other than the reference to TekSavvy's  
12 discussion forum, you're prepared to agree with my  
13 statement?  
14 A. I don't know yet. The  
15 other important point I think -- that is on here,  
16 on this page -- what page is it? Where's the URL  
17 off this page?  
18 93 Q. I don't know. I don't  
19 think you provided it. Did you get this page?  
20 A. Yes.  
21 94 Q. Okay. And when did you  
22 get this page?  
23 A. You know, I don't know,  
24 and have to get into an electronic copy and look  
25 at the file properties. Why there's not a print

1 87 Q. That's fair. And I'm  
2 just trying to do it one-by-one, because I  
3 necessarily can only have one page in front of me.  
4 A. Okay.  
5 88 Q. So let's start with this  
6 one.  
7 A. Yes.  
8 89 Q. Okay. And you agree --  
9 so you agree with the question I just asked? I  
10 don't want to try to -- do you want me to try and  
11 restate it?  
12 A. No.  
13 90 Q. There's nothing in  
14 Exhibit G that is either different from what we  
15 saw other ISPs in Canada doing, in terms of  
16 comparing speeds to sizes of files, and there's  
17 nothing that directly encourages the downloading  
18 or even use of BitTorrent protocol? That's fair  
19 to say?  
20 A. No. Let me think about  
21 this for a minute. See it advertises their  
22 discussion forum, and there's very relevant  
23 aspects in the discussion forum to BitTorrent to  
24 downloading and "dut da dut da" --  
25 91 Q. We'll get there. And

1 date on here, I don't know. I usually make the  
2 practice that print dates are on everything. But  
3 if we need to look, we can find that out.  
4 I think the thing that's  
5 different on here than everybody else's is the  
6 unlimited usage between 2:00 a.m. and 8:00 a.m. I  
7 mean, that's one issue I've got, or one issue that  
8 contributes to the marketing of the TekSavvy  
9 service.  
10 You didn't mention pricing in  
11 packages, so I don't know if we're here to discuss  
12 pricing in packages and what I get if I subscribe  
13 to Bell, or Rogers, or Telus, or Shaw, or Acanac,  
14 you know, any of them --  
15 95 Q. And just to back that up,  
16 just to try to help the Court with what they  
17 actually have to decide, does the pricing in which  
18 TekSavvy competes with Bell, and Rogers, and all  
19 those people, affect the cost that it incurred?  
20 A. Yes, it does.  
21 96 Q. Okay. And how do you say  
22 it does?  
23 A. It does because it  
24 attracts the user, "The more I can download at a  
25 lower per month cost, that's great, like sign me

1 up." And if we read the discussion forums, there  
2 are pages of discussions about, "Wow", you know,  
3 and there are multiple discussion forums. I think  
4 we're just talking about one in here, but there's  
5 multiple discussion forums that talk about  
6 pricing, packages, what you get, the unlimited  
7 downloading.

8 97 Q. So you're -- again, we  
9 want to be very careful, I don't want you to get  
10 into discussions of forums that you haven't put  
11 before the Court, to start with.

12 A. We can --

13 98 Q. I assume that you put  
14 before the Court the most relevant discussion  
15 forums that you felt, that you had identified, to  
16 assist them. That's fair to say?

17 A. Of the material that I'd  
18 looked at. I did not look at the universe of  
19 material. There was just too much. I mean, we  
20 have backups on backups on backups of discussion  
21 forums relating to TekSavvy.

22 99 Q. Do you have the same with  
23 respect to other ISPs, backups on backups on  
24 backups of every single discussion forum that they  
25 have?

1 105 Q. That went to the points  
2 you were trying to make. That's fair to say?

3 A. That's correct. With  
4 what I had available to me in the time available,  
5 yes.

6 106 Q. All right.

7 A. There are, Mr. McHaffie,  
8 I could name a dozen discussion forums with  
9 hundreds of pages of discussion of BitTorrent and  
10 low cost and unlimited downloading and no caps.

11 107 Q. And in any of that, I  
12 assume that if you had seen TekSavvy encouraging  
13 any illegal activity, you would have immediately  
14 printed that one and attached it to your  
15 affidavit?

16 A. Oh, I would think I would  
17 have, yes. I don't think I'm saying though that  
18 TekSavvy is conducting illegal activity.

19 108 Q. No, no, I said  
20 "encouraging illegal activities". If you had  
21 found an instance of TekSavvy encouraging illegal  
22 activities, you would have printed that  
23 immediately and attached it to your affidavit.  
24 That's fair to say? In all of your review of  
25 those hundreds of pages, you would have done that?

1 A. On certain topics,  
2 actually, yes, we do.

3 100 Q. So you've got the Bell.  
4 So Bell, are you saying also has discussion forums  
5 with respect to BitTorrent protocol? Or have you  
6 looked for that?

7 A. I have not looked for  
8 that.

9 101 Q. Have you looked at  
10 Rogers' discussion forums on BitTorrent protocol?

11 A. You know, I've looked at  
12 so many, I don't know what I've looked at anymore.

13 102 Q. Okay. That I think  
14 underscores the point.

15 If you can then turn to 16 --  
16 and, actually, to get back, in terms of the  
17 volume, you've talked -- okay, we've got volume --

18 A. Yeah.  
19 103 Q. Of the ones that you've  
20 got, what you tried to do, I trust, in putting  
21 affidavits before the Court --

22 A. Yeah.

23 104 Q. -- was provide the most  
24 relevant --

25 A. Balanced.

1 A. Had I found TekSavvy  
2 saying, "Hey guys, I'm going to drop X movie  
3 tonight at eight o'clock, come download it, you  
4 can get the link in our discussion forum", most  
5 definitely I would have posted that into our --  
6 into my affidavit.

7 109 Q. All right. And if you  
8 had --

9 A. But that's not really the  
10 view that I've got here.

11 110 Q. And if you had seen  
12 TekSavvy say, "Hey user, you should engage in  
13 unlawful activity", you would have done the same?

14 A. Yes.

15 111 Q. Right.

16 A. But I have to point out  
17 there are 30, 40, authorized TSI individuals to  
18 speak on various websites that -- 40 people  
19 authorized by TekSavvy Solutions to post and  
20 represent the company on DSL reports specifically.  
21 I don't have, and did not have, the time to go to  
22 the extent of that research into every discussion  
23 forum that's available on this topic. There's  
24 just not enough hours in the day.

25 112 Q. Fair enough.

1 A. Thank you.  
 2 113 Q. Now if you -- you then do  
 3 post some examples from discussion forums in --  
 4 and you attach them as Exhibits J, K, and L, and  
 5 M, and N, and O, and P.  
 6 A. Right up to like double  
 7 something, yes.  
 8 114 Q. So let's just take a  
 9 look, for example, at J.  
 10 A. Okay.  
 11 115 Q. So the context of this  
 12 discussion forum is someone asking that -- is  
 13 asking a question regarding the unlimited  
 14 downloading 2:00 to 8:00 a.m., and that upload  
 15 didn't count towards your monthly limit. So  
 16 they're asking questions regarding the pricing of  
 17 a package, and what counts and what doesn't count  
 18 towards it?  
 19 A. Correct. It's a rather  
 20 lengthy thread here.  
 21 116 Q. And you suggest in your  
 22 affidavit at paragraph 16 that a TekSavvy  
 23 representative, TSI-Martin, writes:  
 24 "I like the unlimited  
 25 2:00 to 8:00 a.m.

1 question. That's correct?  
 2 A. He's making a comment  
 3 based on other user comments, because there is  
 4 confusion with the users.  
 5 118 Q. Right. There's  
 6 confusion, and so he's trying to clear up any  
 7 confusion regarding what the plan allows and  
 8 doesn't allow. That's fair to say?  
 9 A. That's a great example to  
 10 show that people are attracted to packages  
 11 relating to pricing and how much internet  
 12 downloads they can do, and usage that they have,  
 13 and speed, and so on and so forth. It goes back  
 14 into their marketing to that community.  
 15 119 Q. So are you surprised that  
 16 people are attracted by an unlimited data plan?  
 17 Is that what you're saying?  
 18 A. Am I -- sorry, repeat the  
 19 question.  
 20 120 Q. Sorry, you're saying this  
 21 goes to the fact that people are attracted to  
 22 things like unlimited data plans? That's not an  
 23 unusual or a surprising thing for an internet user  
 24 to want --  
 25 A. Pending cost.

1 download, you can pull  
 2 one terabyte and still be  
 3 under the cap. If you  
 4 change your habits and  
 5 set up a torrent  
 6 scheduler, no one will  
 7 need unlimited plans."  
 8 (As read)  
 9 That's what you draw from  
 10 this?  
 11 A. Correct, yes.  
 12 117 Q. Okay. Now if you  
 13 actually turn into Exhibit J, you'll see that  
 14 after we look at the start, you've got that  
 15 question that we just described, and somebody  
 16 called TSI-Andre, who is a TekSavvy  
 17 representative, clears up confusion with respect  
 18 to the nature of the plan:  
 19 "2:00 a.m. to 8:00 a.m.  
 20 is unlimited bandwidth,  
 21 and uploads don't count  
 22 for bandwidth usage  
 23 during non-unlimited  
 24 hours." (As read)  
 25 So he's answering the specific

1 121 Q. Right.  
 2 A. Now if I've got an  
 3 unlimited data plan on my BlackBerry, I'm paying  
 4 200 bucks a month. And then you offer it to me  
 5 for 100 --  
 6 122 Q. Yes.  
 7 A. -- you've got my ear.  
 8 123 Q. Yes. And so what you're  
 9 saying there, which doesn't surprise me, is that  
 10 someone wants a better plan for less money, that  
 11 is a general approach that any internet user will  
 12 have?  
 13 A. Definitely. And TekSavvy  
 14 provides that in their marketing, their costing  
 15 backup.  
 16 MR. MCHAFFIE: Do you hear  
 17 that Marc? Isn't that great?  
 18 124 Q. If you can turn to the  
 19 penultimate page of that --  
 20 A. The penultimate page?  
 21 125 Q. Sorry, 5 of 6, second to  
 22 last.  
 23 A. Okay.  
 24 126 Q. This is the actual --  
 25 sorry -- this is the actual comment that you

1 quote. One next to that, 5 of 6, one last one.  
2 Scroll a little bit more. There you go.

3 A. Wait, that's Xdrag.

4 127 Q. Exactly.

5 A. Okay.

6 128 Q. That's the quote that you  
7 put in your affidavit:

8 "I like the unlimited  
9 2:00 to 8:00 a.m.  
10 download, you can pull  
11 one terabyte and still be  
12 under the cap."

13 That's Xdrag, not TSI-Martin.

14 That's fair to say?

15 A. Yes.

16 129 Q. Okay. So your affidavit,  
17 paragraph 16, incorrectly attributes to a TekSavvy  
18 representative a comment that is, in fact, from an  
19 unidentified post-er to that bulletin board,  
20 Xdrag?

21 A. That would be -- and I  
22 draw your attention to the next post -- Morisato.

23 130 Q. Who is that?

24 A. I have no idea. I've not  
25 researched the username Morisato. I'm sure we

1 the TekSavvy representatives all have names that  
2 start TSI somebody? That's right?

3 A. That's correct.

4 135 Q. Okay. So you'll agree

5 with me then that subsequent to the comment that  
6 you've quoted as -- and put to the Court as  
7 suggesting that TekSavvy, "it creates an  
8 environment that encourages its customers to  
9 download movies through the BitTorrent protocol",  
10 that, in fact, there has been no comment  
11 whatsoever from any TSI representative in the  
12 exhibit that you've attached?

13 A. I think -- you are

14 definitely correct. I think the entire thread  
15 should be looked at closely, each of the entries  
16 by everyone. The point is that the attraction of  
17 TekSavvy to unlimited bandwidth, the marketing of  
18 that unlimited bandwidth certainly attracts people  
19 to downloading through the internet using the  
20 TekSavvy as their service provider. Marketing to  
21 that environment has been to TekSavvy's benefit in  
22 attracting --

23 136 Q. Marketing to people who  
24 download is what an ISP does?

25 A. It's one of the things

1 could tell you who that it:

2 "Yes, it is like raising  
3 the cap, but what about  
4 those of us who never  
5 share, us greedy  
6 downloaders, leachers, et  
7 cetera." (As read)

8 131 Q. Okay. So to get back to  
9 my question: Your paragraph 16 mistakenly  
10 attributes to a TekSavvy representative a quote  
11 that is, in fact, from a non-TekSavvy,  
12 unidentified user. That is correct?

13 A. That is correct.

14 132 Q. So it is a straight up  
15 mistake in your paragraph 16?

16 A. It is.

17 133 Q. And, in fact, no TekSavvy  
18 employee subsequently responds or says anything in  
19 response to that comment by whoever Xdrag may  
20 happen to be?

21 A. There is no comment  
22 subsequent to Morisato, which is after Xdrag in  
23 this version of the thread.

24 134 Q. And you know from your  
25 review of the hundreds of pages you describe, that

1 that an ISP has -- undertakes to provide its  
2 internet service successfully, yes.

3 137 Q. And Bell, for example,  
4 offers an unlimited service?

5 A. I'm not aware of what  
6 Bell offers.

7 138 Q. Okay. So you haven't  
8 tried to undertake by comparison, notwithstanding  
9 that what you're --

10 A. I have --

11 139 Q. What you're trying to do  
12 here is pull TekSavvy out of the common ground of  
13 ISPs. That's fair to say?

14 A. No, it's not fair to say.  
15 TekSavvy was simply looked at because of a couple  
16 of reasons: volume that we had traversing their  
17 service, user base, and it's marketing. We could  
18 have picked Nick McHaffie ISP Inc. had they done  
19 the same things. I mean, there was no --

20 140 Q. When you talk about "we  
21 picked", you're talking about who to name as a  
22 Respondent in this -- in the motion to correlate  
23 ISPs? Sorry, IP addresses with consumers?

24 A. No, we just -- we looked,  
25 we looked at volume, we looked at marketing, we

1 looked at users, they fit the profile.  
 2 141 Q. But why are you saying  
 3 "we picked"? What do you mean "we picked" --  
 4 A. Well, at some point --  
 5 142 Q. -- "TekSavvy"?  
 6 A. At some point somebody  
 7 has to go, "Okay, enough discussion, that's the  
 8 company."  
 9 143 Q. Right.  
 10 A. Or "That's the company."  
 11 Well, in this case it was TekSavvy.  
 12 144 Q. Right. And so when you  
 13 say "We picked TekSavvy", you are talking about --  
 14 A. Selected.  
 15 145 Q. -- the picking of  
 16 TekSavvy to be the Respondent in the motion?  
 17 A. No, I'm not suggesting  
 18 that at all.  
 19 146 Q. Sorry --  
 20 A. We picked the file  
 21 sharers using the TekSavvy service.  
 22 147 Q. But, again -- sorry, the  
 23 file sharers using the TekSavvy service are not  
 24 Respondents in the motion. And I'm just trying to  
 25 get to what you say, when you said "We picked

1 TekSavvy", you mean "We picked TekSavvy for this  
 2 proceeding", is what you're talking about?  
 3 A. No, I mean, they were a  
 4 top 25 Canadian ISP at the time, that certainly  
 5 qualified, I mean --  
 6 148 Q. Sorry, you're talking --  
 7 you said, "We picked TekSavvy." You meant, "We  
 8 picked TekSavvy" --  
 9 A. Okay.  
 10 149 Q. -- "for the purposes of  
 11 the -- this proceeding"?  
 12 A. We have --  
 13 150 Q. As opposed to Bell or  
 14 Rogers or Nick McHaffie ISP Inc.?  
 15 A. Yeah, we had 417 ISPs to  
 16 choose from, I mean, at some point you got to go,  
 17 "Okay, where do you begin? Where do we focus our  
 18 study on?" You have to have a starting point.  
 19 151 Q. And when you say "We  
 20 picked", who is "we"?  
 21 A. I don't know "we picked"  
 22 is the best words. I mean, it's how -- I guess  
 23 it's a matter of selecting the words you use. So  
 24 say, "Okay, I'm going to pick the colour black",  
 25 and study black today, then I'm going to study

1 green.  
 2 152 Q. I'm sorry if you don't  
 3 like the words you used, that's fine. I'm trying  
 4 to get to the words that you used --  
 5 A. Yes.  
 6 153 Q. -- which was "We picked  
 7 TekSavvy."  
 8 A. Okay, I don't like the  
 9 words that I used.  
 10 154 Q. Okay, what would you have  
 11 said?  
 12 A. Because it sounds  
 13 targeted, and it's not targeted at all. There's  
 14 no discrimination in the monitoring.  
 15 155 Q. Okay. So in what way --  
 16 I thought you said "We picked TekSavvy because of  
 17 the marketing, the volume", so that was targeted  
 18 on that basis?  
 19 A. Bell, too expensive.  
 20 Rogers, too expensive. Telus, too expensive. I'm  
 21 here in Ontario, I wasn't going to fly out there  
 22 and spend my days and months sitting out in  
 23 Alberta.  
 24 156 Q. All right. So the "we"  
 25 is you, you and your company, you and Voltage, you

1 and Mr. Zibarras?  
 2 A. No, I -- no, I tendered a  
 3 report and that's where it went. I mean, you  
 4 know, they wanted to know numbers, like, you know,  
 5 what types of file shares we're talking about,  
 6 what's the volume.  
 7 157 Q. When you did your -- when  
 8 you did your monitoring, was it monitoring of only  
 9 TekSavvy IP addresses?  
 10 A. No.  
 11 158 Q. So there were other IP  
 12 addresses in there, and they returned -- the  
 13 information that returned also captured IP  
 14 addresses for other ISP providers?  
 15 A. Every ISP.  
 16 159 Q. But "we picked", you  
 17 picked the --  
 18 A. Okay, well, you're  
 19 labelling me as --  
 20 160 Q. Well, I'm labelling you  
 21 as "we" because I still haven't --  
 22 A. Okay, I recommended, I  
 23 recommended that we look at TekSavvy based on  
 24 certain criteria.  
 25 161 Q. Okay.

1 A. The size of the company,  
 2 the volume of its customers, the volume of file  
 3 sharers, the fact that it was not a  
 4 publicly-traded company, it was a privately held  
 5 company.  
 6 162 Q. Why did that matter?  
 7 A. Subscriber base.  
 8 TekSavvy, Bell.  
 9 163 Q. So size? So the fact  
 10 that they were smaller was one of the reasons --  
 11 A. No, no, the size of the  
 12 subscriber base, not the size of the pockets.  
 13 164 Q. No, no, no, but the size  
 14 -- okay, it was a smaller ISP, they had  
 15 200,000-odd subscribers as opposed to a million,  
 16 so there we're going to -- we're going to -- that  
 17 was part of your recommendation to Voltage, that  
 18 they go and name TekSavvy as opposed to others?  
 19 A. Did you want to go in at  
 20 the smallest ISP, did you want to go in at the  
 21 biggest ISP? Let's pick one that's -- you know,  
 22 like here's the criteria. I mean, I could give  
 23 you criteria on 50 of them. That just happened to  
 24 be the one.  
 25 165 Q. That you recommended?

1 168 Q. So we've dealt with  
 2 Exhibit J.  
 3 A. Yes, that was the thread  
 4 that discussed unlimited downloading after hours,  
 5 and use of BitTorrent, and downloading a terabyte,  
 6 and, yes, we did talk about that.  
 7 169 Q. And then if you look at  
 8 Exhibit K -- and that's in the context of your  
 9 paragraph 17 -- and you refer to throttling. You  
 10 say:  
 11 "Throttling is a process  
 12 put in place by some ISPs  
 13 to reduce the speed of  
 14 file sharing traffic."  
 15 (As read)  
 16 Throttling is not directed  
 17 entirely or exclusively at file sharing traffic.  
 18 That's fair to say?  
 19 A. Yes, that's fair to say,  
 20 although most references are made to file sharing  
 21 because of the congestion, traffic congestion  
 22 uses, yeah.  
 23 170 Q. Okay. And you note that:  
 24 "TekSavvy is opposed to  
 25 throttling and does not

1 A. That I recommended.  
 2 166 Q. And the result of that  
 3 recommendation was that Voltage named TekSavvy as  
 4 the responding party in this proceeding?  
 5 A. I don't know what the  
 6 result was. I don't think we named TekSavvy. I  
 7 think we asked for a production order. I don't  
 8 think we're suing TekSavvy, or Voltage is suing --  
 9 167 Q. But you named them as the  
 10 responding party.  
 11 MR. ZIBARRAS: Well, I don't  
 12 know if he knows --  
 13 MR. MCHAFFIE: I don't want to  
 14 get into --  
 15 MR. ZIBARRAS: -- the  
 16 legalities of it. I don't know where this is  
 17 going, Mr. McHaffie. You're having a field day on  
 18 completely irrelevant stuff to the motion.  
 19 Anyway.  
 20 MR. MCHAFFIE: He's the one  
 21 who's putting the information forward, and I'm  
 22 cross-examining on where it goes, so.  
 23 MR. ZIBARRAS: All right. But  
 24 let's get back to something that's relevant.  
 25 MR. MCHAFFIE:

1 throttle file sharing  
 2 traffic." (As read)  
 3 Are you saying that -- you're  
 4 not saying that that's a bad position, are you?  
 5 Or are you saying that we should support  
 6 throttling of file sharing? Or are you making a  
 7 comment one way or the other on it?  
 8 A. No, I'm not making a  
 9 comment on it whatsoever. I think what's being  
 10 said there is that TekSavvy advertises that it  
 11 doesn't throttle.  
 12 171 Q. Okay.  
 13 A. Whereas at the time, I  
 14 think this was a CRTC issue, throttling?  
 15 172 Q. Do you know?  
 16 A. It was.  
 17 173 Q. Okay.  
 18 A. And a consumer issue.  
 19 174 Q. And so -- so throttling  
 20 affects the access speed of a user?  
 21 A. Yes.  
 22 175 Q. And so someone who  
 23 advertises that "We don't throttle" is advertising  
 24 "You will have better access speed"?  
 25 A. In effect, that's what

1 the general user would think, yes. Now TekSavvy  
2 leases its line, so it really has no control, I  
3 don't believe, I could be wrong.

4 176 Q. But when we look at  
5 Exhibit K and Exhibit L, they talk about trying to  
6 avoid throttling, trying to avoid having your  
7 network traffic slowed down by throttling?

8 A. Correct.

9 177 Q. Okay. And nothing in  
10 there encourages someone to either engage in  
11 illegal conduct, or speaks to the use of  
12 BitTorrents in downloading movies? It's talking  
13 about throttling, and it's talking about MLPPP?

14 A. Yeah, I think it's  
15 perfectly legal to use Multilink PPP. I think it  
16 is also very attractive when I hear, "Hey, my ISP  
17 doesn't throttle. In fact, my ISP will help me  
18 bypass throttling." I think it was one of the  
19 unique companies that provided that service. I  
20 know there's a lot of discussion in the forums  
21 about that, where to go, and how to establish the  
22 MLPPP.

23 178 Q. And so then once we've  
24 gone through there, at G, H, I, J, K, L, we're now  
25 through the exhibits that you have put to the

1 customer wanting to know how much they have  
2 downloaded or uploaded so far, as they don't want  
3 to reach their 75 gigabytes and pay fees, that's  
4 what the customer's inquiry is, "How do I find out  
5 how much I have used?"

6 A. Yeah, they're asking "How  
7 much use have I used? How can I determine how  
8 much bandwidth I've used?"

9 183 Q. Right. And TSI-Liz, who  
10 you have pointed to in paragraph 19, is a TekSavvy  
11 representative. And what she does in response is  
12 advise the user where they can go to track how  
13 much bandwidth they've used. That's the response  
14 that they give?

15 A. That's correct. The user  
16 being an unidentified person.

17 184 Q. Right.

18 A. That states in there how  
19 much more they've been downloading with torrents.

20 185 Q. Right. So the customer  
21 is asking, "How can I find out how much I've  
22 used", and TSI responds, "This is where you can go  
23 to find out how much you've use"?

24 A. Regardless of what  
25 they're doing, the user or TekSavvy, it's a very

1 Court to support your heading "TekSavvy is the  
2 Ideal Environment to Download Movies Through the  
3 BitTorrent Protocol"?

4 A. No, I wouldn't say that's  
5 the extent of the evidence that invites persons to  
6 -- or attracts people to TekSavvy, no, that's not  
7 the extent at all. It's just that those five  
8 paragraphs are very focused on that.

9 179 Q. No, and in terms of what  
10 you have put forward to the Court --

11 A. Yes.

12 180 Q. -- under that heading,  
13 we've now covered those off. Fair to say?

14 A. Yes.

15 181 Q. Okay. Now moving to  
16 "TekSavvy Customers Openly Use TekSavvy to  
17 Download Films". Again, that's a heading that  
18 effectively you want the Court to conclude, based  
19 on the information that you set out in  
20 paragraphs 19 to 22, and the exhibits that you  
21 attach to it. That's fair to say?

22 A. That's correct.

23 182 Q. Okay. So if you start by  
24 looking at Exhibit M then, this is in response --  
25 this thread started with a question about a

1 fair question, it's a very fair answer.

2 186 Q. And nothing in here at  
3 all talks, at least as I look through it, talks  
4 about downloading movies. That's fair to say?

5 MR. ZIBARRAS: At tab M?

6 MR. MCHAFFIE: Yes.

7 THE WITNESS: No, I don't see  
8 any reference to movies.

9 MR. MCHAFFIE:

10 187 Q. All right. So if the  
11 proposition were TekSavvy's customers openly used  
12 TekSavvy to download films, you would have to look  
13 elsewhere for that information than Exhibit M.  
14 That's fair to say? And we'll move on to Exhibits  
15 N, and O, and P in a second.

16 A. Yes.

17 188 Q. So far so fair?

18 A. Yeah.

19 189 Q. Okay. So Exhibit N then,  
20 if you can turn that up, you have a user who is  
21 named Admin this is a guest. And really it's fair  
22 to say that their comment there is talking about  
23 speed, the speed that they're obtaining as a  
24 result of a speedtest.net?

25 A. Dot net, yeah.

1 190 Q. Right. So the customer  
2 has said something and said, "I've run  
3 speedtest.net, and this is the speed that I get,  
4 and it's great", and TSI-Keith, who's the TSI  
5 admin, responds, "Glad it's going so well for you,  
6 we hope so too. Welcome board." That's the  
7 response?

8 A. That is the response,  
9 Mr. McHaffie.

10 191 Q. So fair to incapsulate it  
11 someone says "I am getting great speed" --

12 A. Mm-hmm.

13 192 Q. -- "on torrents", and  
14 someone responds, "That's great"?

15 A. Yes.

16 193 Q. Okay. And, again, if we  
17 were looking for open discussion of downloading  
18 films, we would not find it in Exhibit N. That's  
19 fair to say?

20 A. Yes.

21 194 Q. And you're not saying  
22 that TSI-Keith's response is an inappropriate  
23 response to a customer saying, "I'm getting great  
24 speed net results"?

25 A. No, I do think it still

1 going to look at O, which is the next one that  
2 you've put forward. And if you look at O, the  
3 original question that is posted by Cyraan,  
4 C-y-r-a-a-n, is that they've brought -- they  
5 bought a brand new router, Cisco Linksys EA3500.  
6 Do you know what that is?

7 A. Yes, I do.

8 199 Q. Okay. What's that?

9 A. It is a router.

10 200 Q. It's a router that they  
11 use to access the internet?

12 A. That's correct.

13 201 Q. Okay. And that's  
14 something that the user themselves has provided to  
15 access TekSavvy? It's different than a modem, but  
16 it's something -- it is a router that they've got  
17 in their system?

18 A. That's correct.

19 202 Q. Okay. And they're having  
20 problems with connecting a computer using RDP?

21 A. Mm-hmm.

22 203 Q. And so their question has  
23 to do with blocking incoming ports, and some  
24 service issues that they've got?

25 A. Mm-hmm.

1 goes back to the attraction to customers, and the  
2 marketing package, and the overall picture of what  
3 TekSavvy provides, and the unlimited bandwidth,  
4 speed, cost, packages, access, anti-throttling,  
5 it's a pirate haven.

6 195 Q. That's your opinion?

7 A. Actually, it would be  
8 based on fact.

9 196 Q. No, but I'm -- that  
10 saying "It is a pirate haven", are you saying that  
11 is a fact, or are you saying that is your opinion  
12 based on the various things that you've put  
13 forward?

14 A. No, I've monitored  
15 TekSavvy, I've monitored other films for other  
16 clients, including Voltage Picture Properties,  
17 there's a lot of file sharing activities that goes  
18 through the TekSavvy. So the overall picture,  
19 when I look at this, and I go, "Okay, what are  
20 they selling?"

21 197 Q. So allow me to continue  
22 to examine you on your affidavit, as you have put  
23 forward to the Court.

24 A. Certainly.

25 198 Q. Great. So we're now

1 204 Q. And TSI-Danielle responds  
2 that:

3 "We don't block any ports  
4 on our side, so you may  
5 want to have a look at  
6 your router settings."  
7 (As read)

8 So I take it you have no issue  
9 with that response?

10 A. No.

11 205 Q. Okay. And Cyraan goes on  
12 and saying:

13 "I still can't get  
14 anything to work. When I  
15 connect the computer  
16 directly in the modem, I  
17 still can't get  
18 BitTorrent to work. I  
19 took my computer to my  
20 friends, and, again,  
21 they're having a  
22 connection timeout  
23 issue." (As read)

24 And then another TSI admin or  
25 representative is again trying to respond to their

1 technical issue of not being able to access, with  
 2 respect to torrent and programs, including  
 3 BitTorrent, saying:  
 4 "I'm not familiar with  
 5 BitTorrent, but Utorrent  
 6 allows you to affect the  
 7 ports." (As read)  
 8 Again, they're trying to deal  
 9 with this issue of ports. Fair to say that,  
 10 again, in all of this, there's no reference to  
 11 using the BitTorrent protocol to download movies?  
 12 A. No, there's just  
 13 reference to BitTorrent, and the young lady -- I'm  
 14 guessing it's a young lady -- couldn't get her --  
 15 206 Q. Why is Cyraan a young  
 16 lady?  
 17 A. Well, it just seems  
 18 feminine to me.  
 19 207 Q. Never mind. It doesn't  
 20 matter. Go ahead.  
 21 A. If it was masculine I  
 22 would use like Big Joe or something.  
 23 208 Q. Okay. Sure.  
 24 A. Yeah, BitTorrent, I mean,  
 25 it talks about BitTorrent. I think some of the

1 A. Well, that's what you  
 2 said.  
 3 214 Q. Yes, I'm saying that, and  
 4 I'm asking you to agree with me.  
 5 A. I think it's complete  
 6 context, that we have to look at everything. No,  
 7 in Cyraan's post -- or the Cyraan post, or the  
 8 TSI-John post --  
 9 215 Q. They mention BitTorrent,  
 10 and that's what you're going to?  
 11 A. They mention BitTorrent,  
 12 yes.  
 13 216 Q. The fact that they  
 14 mention BitTorrent is what you say constitutes  
 15 "openly using TekSavvy to download films"? Any  
 16 mention of BitTorrent anywhere?  
 17 A. They're not talking about  
 18 films in here.  
 19 217 Q. Right.  
 20 A. They're talking about  
 21 using BitTorrent.  
 22 218 Q. Right.  
 23 A. Most people don't go on  
 24 the internet and say, "How do I download movies  
 25 with BitTorrent?" They already have that

1 context of -- reference to BitTorrent and Utorrent  
 2 are inaccurate, but that's splitting hairs.  
 3 209 Q. But you've agreed with me  
 4 before that BitTorrent can be used for a variety  
 5 of purposes, it is simply a protocol?  
 6 A. It's largely used for  
 7 large amounts of data, stolen movies constitute  
 8 large amounts of data.  
 9 210 Q. And some from all --  
 10 A. Most people I've  
 11 encountered that use BitTorrent use it for  
 12 exchanging large amounts of data such as stolen  
 13 movies.  
 14 211 Q. What I'm trying to ask is  
 15 really what -- you know, what you said to the  
 16 Court is "Look at a bunch of exhibits" --  
 17 A. Yup.  
 18 212 Q. -- "where TekSavvy  
 19 customers are openly using TekSavvy to download  
 20 films."  
 21 A. That's correct.  
 22 213 Q. And is there any  
 23 discussion whatsoever at all in paragraph O with  
 24 respect to the downloading of films? No, there is  
 25 not.

1 knowledge. It's just that it's -- it seems to be  
 2 generally.  
 3 219 Q. In the context of the  
 4 question that was asked with respect to accessing  
 5 ports and data problems, do you have any issue  
 6 with the response that was given by TekSavvy to  
 7 the technical issue that was raised by the user?  
 8 A. No, I don't.  
 9 220 Q. If you then turn to  
 10 Exhibit P --  
 11 A. I'm wondering if TSI-John  
 12 has a lot of familiarity with BitTorrent, or users  
 13 of TekSavvy's service and BitTorrent, because he  
 14 seems to have some basic knowledge of Utorrent and  
 15 ports.  
 16 221 Q. He says actually:  
 17 "I'm not too familiar  
 18 with BitTorrent." (As  
 19 read)  
 20 A. Yes, exactly. So he's  
 21 guessing.  
 22 222 Q. So nonetheless you  
 23 speculate that he does?  
 24 A. Just like TSI-John did,  
 25 yes, I did speculate.

Page 63	Page 65
<p>1 223 Q. You can turn up Exhibit 2 P: 3 "This is where your ears 4 must have been burning." 5 (As read) 6 A. Oh, yes. I remember 7 this. 8 224 Q. Again, you'll agree that 9 none of the discussion here has to do with open 10 discussion of using TekSavvy to download films? 11 You'll agree with that? 12 A. No, I don't. 13 225 Q. Okay. So where does it 14 talk about downloading films? 15 A. Well, it talks about VPNL 16 (ph). If we look at the history of piracy, which 17 we start in paragraphs 1 to 8, there's a lot of 18 worldwide discussion on how to defeat monitoring 19 services such as Canipre. 20 226 Q. Yes. 21 A. And there are thousands, 22 millions perhaps, of pages on techniques, and 23 uses, and of actually services based right here in 24 Toronto, Canada, on VPN, and proxy services. And 25 both services are set up specifically for privacy,</p>	<p>1 is talking about VPNs? 2 A. Correct. 3 232 Q. Right. 4 A. Yes. Virtual Private 5 Networks. 6 233 Q. Yes. Does TekSavvy offer 7 a VPN? 8 A. They do not offer a VPN. 9 234 Q. Okay. So there's a 10 discussion -- 11 A. Actually, wait, I want to 12 back that up. I don't believe they offer VPN 13 services. 14 235 Q. Okay. Because I don't 15 want you to speak to things you don't know. 16 A. That's right. I don't 17 know for certain if they do or if they don't. 18 236 Q. And so nobody here on 19 this post is from TekSavvy, on this thread? 20 A. No, it's occurring in the 21 TekSavvy forums, so the moderators and 22 administrators from TekSavvy would certainly be 23 aware of a discussion like this, about VPN and 24 BitTorrent, and how to configure the systems -- 25 237 Q. I'm sorry, where does it</p>
Page 64	Page 66
<p>1 for anonymity. So when I want to steal from you, 2 you can't catch me. 3 227 Q. Sorry, wait a second, I 4 was with you until the end. 5 A. Okay. 6 228 Q. Are you saying that the 7 only reason that people would want privacy or 8 anonymity on the internet is to steal from people? 9 A. No, I'm not. 10 229 Q. Okay. 11 A. Computer crimes and IP 12 crimes are very much prevalent in today's world. 13 I mean, that's nothing to debate. I mean, I think 14 it's well-established. 15 230 Q. Right. But privacy -- 16 but privacy is not something -- that you want to 17 commit crimes. That's fair to say? People do not 18 just want privacy to commit crimes. That's fair 19 to say? 20 A. No, that would not be 21 fair to say. But in the context of BitTorrent, 22 and films, and piracy, that is why VPN services 23 are used. That is nothing we have to establish, 24 that is the way it is. 25 231 Q. But this is not -- this</p>	<p>1 talk about BitTorrent? I may have missed that. 2 A. We have one thread of 3 hundreds. 4 238 Q. Yeah, no, I'm asking 5 about what you put to the -- 6 A. Okay, well, I didn't know 7 we were going to talk about BitTorrent and VPN in 8 the same breath in today's examination or else -- 9 239 Q. I'm saying you just did, 10 I'm trying to get to that. Right? 11 A. Okay. That's why that's 12 not in here. 13 240 Q. Okay. 14 A. So the question was 15 actually what? 16 241 Q. No, I was just -- you had 17 answered a question saying that TekSavvy monitors 18 people talking about VPNs and BitTorrent like 19 here. 20 A. Definitely. 21 242 Q. And I was just making it 22 clear that this discussion of VPNs, which gives 23 people, among other things, privacy and anonymity 24 on the internet -- 25 A. Correct.</p>

1 243 Q. -- does not discuss  
 2 BitTorrent. That's fair to say?  
 3 A. Based on the fact that I  
 4 only brought up BitTorrent today, as opposed to  
 5 previously when I created the affidavit, which was  
 6 simply to talk about the purpose of VPN, it does  
 7 not say VPN services and BitTorrent in the same --  
 8 I mean, we just --  
 9 244 Q. All right.  
 10 A. -- seconds ago come up  
 11 with the two in the same sentence.  
 12 245 Q. And I think you agreed  
 13 with me --  
 14 A. This is about VPN  
 15 services in -- discussed in the same discussion  
 16 forum administered, controlled by TekSavvy and its  
 17 representatives.  
 18 246 Q. And I think you agreed  
 19 with me that people want a VPN, or they want  
 20 anonymity and privacy on the internet, it can be  
 21 for a variety of reasons. You'll agree with me on  
 22 that?  
 23 A. That would be an  
 24 opinion-based or opinion-type question, an  
 25 opinion-based answer.

1 A. I didn't pick up on that.  
 2 252 Q. It was just an oversight  
 3 that you had listed --  
 4 A. It's just an oversight,  
 5 yeah. But there was seven actually. Just if you  
 6 give me a moment here, it's likely...  
 7 253 Q. None of them are Bell or  
 8 Rogers it appears?  
 9 A. Well, no, no, no, it's  
 10 either Telus, Bell, or Rogers. I forget who it  
 11 was. I don't think it was Rogers. We're down to  
 12 Bell and Telus. It was likely Telus, but, I mean,  
 13 if I could -- I would have to look at something to  
 14 tell you specifically.  
 15 254 Q. And by the time that you  
 16 had done this --  
 17 A. Mm-hmm.  
 18 255 Q. -- had you picked  
 19 TekSavvy to recommend?  
 20 A. Had I picked, I didn't  
 21 pick anybody, I recommended.  
 22 256 Q. When did you recommend?  
 23 A. You know, I mean, we're  
 24 talking two and a half years ago, I can't give you  
 25 a date off the top of my head. It's hard for me

1 247 Q. Okay, then I don't want  
 2 you to get into your opinion, because you said  
 3 you're not providing expert evidence.  
 4 A. No, I think what's better  
 5 is we find a study on these, of VPN piracy and  
 6 BitTorrent.  
 7 248 Q. So if you can turn then  
 8 to paragraph 23 of your affidavit.  
 9 A. We could go back and talk  
 10 about VPN for a little while, if you'd like.  
 11 249 Q. In paragraph 23 --  
 12 A. Yes.  
 13 250 Q. -- you say that you  
 14 contacted employees of seven different ISPs to  
 15 inquire about how they respond to and process  
 16 court orders requiring ISPs to identify the  
 17 contact information associated with the specified  
 18 IP addresses. Now you list six of them, do you  
 19 know who the seventh was?  
 20 A. I do actually, the  
 21 problem is that I cannot cite it from my mind. If  
 22 I was able to confer with something, then I can  
 23 give you the seventh.  
 24 251 Q. Why did you not include  
 25 the seventh?

1 to say. I mean, it was probably a discussion at  
 2 that time. I mean, if I just look at the date  
 3 sequence here, I think the filing was in November  
 4 2012.  
 5 257 Q. The -- as you say, in  
 6 terms of date sequence, the IP addresses in this  
 7 sheet run -- or the date stamps run from  
 8 September 1, 2012, or September 2012 to October  
 9 twenty --  
 10 A. I think the actual  
 11 question is that at that point in time, yes, they  
 12 were, because we had had prior -- we had  
 13 communications with them at that point.  
 14 258 Q. You'd already had -- at  
 15 the time you started monitoring? Because you  
 16 started monitoring at September 2012.  
 17 A. Did we, or was it August?  
 18 259 Q. Well, I don't know when  
 19 you started monitoring.  
 20 A. August, September,  
 21 October --  
 22 260 Q. Let me take that back. I  
 23 don't know when you started monitoring. The  
 24 information that you've put forward --  
 25 A. Yes.

1 261 Q. -- relates to the time  
 2 period from September 2012 to the end of  
 3 October 2012.  
 4 A. No, I think there was  
 5 90 days.  
 6 262 Q. Well, we can look it up.  
 7 MR. ZIBARRAS: We can look it  
 8 up, I don't know off-hand. It probably doesn't  
 9 really matter, but.  
 10 THE WITNESS: There was -- I  
 11 believe that -- actually, I can't remember.  
 12 MR. MCHAFFIE:  
 13 263 Q. Okay. Why did you  
 14 contact employees in this time period -- did you  
 15 -- it seems like you contacted them before the  
 16 motion had been passed to TekSavvy. Is that fair  
 17 to say?  
 18 A. No, because I can't  
 19 remember when the file was actually -- the claim  
 20 was issued. I can't remember the date that the --  
 21 there was some original discussions with TekSavvy.  
 22 I remember having conversations with Mr. Tacit, I  
 23 remember having conversations with Patrick.  
 24 264 Q. And I don't think it's  
 25 disputed --

1 couple of these inquiries here. With TekSavvy  
 2 specifically I think it came up.  
 3 271 Q. And only TekSavvy?  
 4 A. No, I think Jody Heath  
 5 spoke to that as well. But, again, I'm going from  
 6 memory, I don't have the actual notes in front of  
 7 me, so I can't say. But I do believe it was --  
 8 272 Q. So you do have notes of  
 9 these conversations?  
 10 A. Oh yes.  
 11 273 Q. You neither attached  
 12 them, and I assume you didn't bring them with you  
 13 today?  
 14 A. Well, they're standard  
 15 investigative notes. I do have them with me  
 16 today, yes, they're in electronic form. And I  
 17 recall Patrick gave me a description of their  
 18 lines, and explained to me that some of their --  
 19 it was cable internet, it was cable internet  
 20 services that was resold, you know, to a  
 21 third-party company, and who they subscribed to was  
 22 that company's information. I've always thought  
 23 that that was maybe one of the reasons why they  
 24 couldn't reconcile all of our addresses.  
 25 274 Q. In terms of the

1 A. Yeah.  
 2 265 Q. -- that the draft motion  
 3 materials were forwarded to TekSavvy --  
 4 A. Maybe that's what --  
 5 266 Q. -- on November 1, 2012.  
 6 A. Okay, then maybe that's  
 7 what I'm talking -- because we had -- we wanted to  
 8 understand what was involved in reconciling an IP  
 9 address.  
 10 267 Q. Because that wasn't  
 11 something that you understood prior to that?  
 12 A. I had ideas, but I had  
 13 not talked to anybody from the ISP industry --  
 14 268 Q. Okay.  
 15 A. -- about A, B, and C.  
 16 269 Q. And are any of the others  
 17 that you -- other ISPs that you spoke to,  
 18 wholesale network access-based ISPs?  
 19 A. That wasn't part of my  
 20 inquiry.  
 21 270 Q. You don't know one way or  
 22 the other? In other words, whether they owned  
 23 their own wires or only operate through access to  
 24 others?  
 25 A. No, that did come up in a

1 information that you give under this heading, "The  
 2 Cost of Identifying Customers Based on IP  
 3 Addresses" --  
 4 A. Mm-hmm.  
 5 275 Q. -- some of it's obvious,  
 6 but I just need to get it on the record, you don't  
 7 yourself run an ISP or work for an ISP?  
 8 A. No, I do not.  
 9 276 Q. Okay. So the information  
 10 in this section is not based your experience, but  
 11 based on the conversations that you had with  
 12 others?  
 13 A. That do -- it's based on  
 14 the conversations that I had with others that do  
 15 reconcile IP addresses.  
 16 277 Q. Okay. And except as it  
 17 relates to your discussion with TekSavvy, it  
 18 relates to information you have obtained from  
 19 others with respect to their processes and not  
 20 TekSavvy's processes?  
 21 A. With all of them -- all  
 22 of them with the exception of Patrick Misur.  
 23 278 Q. Right. And when you  
 24 spoke to Patrick Misur --  
 25 A. Mm-hmm.

1 279 Q. -- did you know that  
 2 Voltage was going to be asking -- or naming  
 3 TekSavvy as a Respondent on their motion?  
 4 A. All I can do is go back  
 5 to my initial confusion here with the draft  
 6 materials, my recommendations, what was decided,  
 7 beyond me, and becoming aware that a claim would  
 8 be issued. Whether that was before or after my  
 9 discussion with Patrick, I can't remember.  
 10 280 Q. Would your note indicate  
 11 when -- your computer note indicate when you spoke  
 12 with Mr. Misur, the date?  
 13 A. Would my computer note  
 14 indicate it, well, the computer note definitely  
 15 would.  
 16 281 Q. Okay. Is that something  
 17 that can be pulled up, so you can say, "This is  
 18 when I spoke to Patrick Misur, and whether it's  
 19 before or after we knew that we were going to be  
 20 naming TekSavvy"?  
 21 MR. ZIBARRAS: Do you want to  
 22 check?  
 23 THE WITNESS: I have no  
 24 problem with that, if James has no problem with me  
 25 doing that.

1 it was your own investigation?  
 2 THE WITNESS: Oh, I can't  
 3 remember.  
 4 MR. MCHAFFIE:  
 5 285 Q. Okay. Have you managed  
 6 to get Mr. Misur's notes up there?  
 7 A. No. Are we ready?  
 8 286 Q. Yup, yup. Sorry, I was  
 9 just trying to do that in the background while  
 10 your laptop fired up.  
 11 A. It's fired. I feel like  
 12 everybody's watching me.  
 13 287 Q. Don't worry, we haven't  
 14 got the 30-second stop clock on.  
 15 A. You know, I've got  
 16 exactly 630 potential documents to look at here  
 17 right now, and I'm just wanting to let you know it  
 18 may take me some time here.  
 19 288 Q. Okay. It was only  
 20 because I thought it was a short exercise. I  
 21 don't think for now we need to do that.  
 22 A. Yeah, if you can give me  
 23 just a moment here, I can...  
 24 289 Q. I don't want --  
 25 A. I know where it's sitting

1 MR. MCHAFFIE:  
 2 282 Q. Okay. Is it a long  
 3 process? I don't want to belabour the point, but  
 4 --  
 5 A. It would take probably 30  
 6 seconds.  
 7 283 Q. Okay, great. Let's do  
 8 that. And just while you're doing that, was that  
 9 something that you were asked to do by Voltage, or  
 10 by Voltage's counsel, to undertake these  
 11 inquiries?  
 12 A. Was I asked by Voltage to  
 13 undertake those inquiries, or was I asked by  
 14 Voltage's counsel --  
 15 MR. ZIBARRAS: Just don't  
 16 discuss any communications with counsel. So I  
 17 guess you can answer if Voltage directly asked  
 18 you --  
 19 MR. MCHAFFIE: All right,  
 20 let's start with that.  
 21 284 Q. Were you doing it of your  
 22 own volition, or were you doing it at somebody's  
 23 instruction or request?  
 24 MR. ZIBARRAS: Were you doing  
 25 it under a retainer, or were you doing it -- just

1 elsewhere, but I don't have connectivity here.  
 2 290 Q. Right, right, Wifi or  
 3 whatever to get you --  
 4 A. Oh, oh. Yeah, you know,  
 5 I'm going to end up sitting here for half an hour.  
 6 291 Q. Okay. No intention to do  
 7 that.  
 8 A. I'll try one more thing  
 9 here. Who's another name off the file?  
 10 292 Q. Jody Heath.  
 11 A. Heath.  
 12 293 Q. Was this contact --  
 13 between you and Mr. Misur -- was it by e-mail or  
 14 by telephone?  
 15 A. Oh, I think it was both.  
 16 294 Q. Okay. So what you're  
 17 looking for now is your report rather than a  
 18 particular e-mail?  
 19 A. No, no, the report -- I  
 20 called up -- or determined who it was to speak to.  
 21 295 Q. Right.  
 22 A. And how did I do that? I  
 23 think I might have just called up TekSavvy's  
 24 technical support, which is usually where I start,  
 25 end up over at business services, or looking for

1 legal or regulatory, and ended up with Patrick.  
2 And did Patrick have to call me back and then  
3 that's how Christian was injected? I mean, you  
4 probably have those e-mails, so maybe you could  
5 look?  
6 296 Q. So I guess the question,  
7 whether -- and just trying to pin down the date,  
8 whether this was e-mail or --  
9 A. Yeah, it's not going to  
10 happen without, you know, without my files and  
11 connectivity.  
12 297 Q. Okay. All right. Then  
13 we'll just leave it at that then. I don't want to  
14 -- and I understand that you, again, attempted to  
15 contact TekSavvy just two days ago, on Tuesday of  
16 this week?  
17 A. Did I try and contact  
18 TekSavvy, yes.  
19 298 Q. And were you asked to do  
20 that, or was that of your own volition?  
21 MR. ZIBARRAS: Well, don't  
22 discuss lawyer communication --  
23 MR. MCHAFFIE: No, I'm just  
24 asking the question: Were you asked to do that?  
25 MR. ZIBARRAS: Yes, he was --

1 he was asked to do that.  
2 MR. MCHAFFIE: Okay.  
3 299 Q. Were you asked to do that  
4 by counsel?  
5 MR. ZIBARRAS: Yes, he was  
6 asked by me to do it.  
7 MR. MCHAFFIE:  
8 300 Q. And if you can look at  
9 paragraph 25, please.  
10 A. It you'd like I could  
11 send an e-mail to my office and ask --  
12 301 Q. I very much appreciate  
13 the effort to be of assistance, but I don't want  
14 to spend too much time on that issue. I was just  
15 trying to get a sense of where it stood vis-à-vis  
16 --  
17 A. Yeah, I was just trying  
18 to be helpful.  
19 302 Q. So paragraph 25 you  
20 state:  
21 "Most ISPs have a  
22 dedicated employee or  
23 team of employees tasked  
24 with responding to such  
25 requests." (As read)

1 "Such requests" being requests  
2 for personal information based on something like  
3 an IP address?  
4 A. That would be one, yes.  
5 303 Q. Okay. And do the -- do  
6 the -- all of the seven that you spoke to --  
7 sorry, the six, besides TekSavvy, leaving aside  
8 TekSavvy, did the other six all have dedicated  
9 employees or teams of employees?  
10 A. Yes, they do.  
11 304 Q. So ViaNet, for example,  
12 has one person or more whose sole job it is to  
13 respond to such requests?  
14 A. Yes, you asked me if it  
15 has a team or employee --  
16 305 Q. Yeah.  
17 A. -- and Jody Heath is the  
18 dedicated contact person at ViaNet, yes.  
19 306 Q. Okay, but when you say --  
20 maybe I got it backwards, does "dedicated  
21 employee" mean that's all they do, or just that  
22 that's the person to contact?  
23 A. I think it's -- the  
24 answer is both.  
25 307 Q. Okay.

1 A. In a case of Rogers, they  
2 have a small army. In the case of -- what is --  
3 this is Jody's company, is it Via --  
4 308 Q. ViaNet.  
5 A. ViaNet, a small  
6 Sudbury-based ISP servicing a small region of  
7 Ontario.  
8 309 Q. So your understanding was  
9 that that's all Jody Heath does, is respond to  
10 these --  
11 A. No, it was not.  
12 310 Q. Oh, okay. Sorry. So  
13 these people are the contact -- they all have one  
14 person whose the contact point for such inquiries?  
15 A. Yes. Now in Jody's case,  
16 he's the contact person, he's also the doer.  
17 311 Q. Right.  
18 A. And he's also the person  
19 I would deal with if I was looking for a  
20 production order.  
21 312 Q. But that's not his --  
22 A. That's not his --  
23 313 Q. It's his --  
24 A. Yes.  
25 314 Q. I didn't know that.

1 That's not his sole job?  
 2 A. No, it's not his sole  
 3 function. And, again, that goes to the size of  
 4 the ISP.  
 5 315 Q. Okay. So when you say --  
 6 I mean, this -- Jody Heath is not a dedicated  
 7 department to responding to these sorts of  
 8 requests?  
 9 A. No, he is like a systems  
 10 -- corporate system -- their services managers.  
 11 316 Q. And, similarly, Jonathan  
 12 Scott of Execulink --  
 13 A. Same thing.  
 14 317 Q. He's not a dedicated  
 15 department?  
 16 A. He's the go-to guy.  
 17 318 Q. So Bell maybe, Rogers  
 18 maybe, Shaw, the big guys, may have people who are  
 19 dedicated to that task exclusively. Do you know?  
 20 A. Yes, they do.  
 21 319 Q. Okay, they do. But  
 22 smaller players do not?  
 23 A. They don't need to, I  
 24 don't believe.  
 25 320 Q. Okay. And in terms of

1 A. No, I don't.  
 2 324 Q. Okay. And you don't know  
 3 how long it took them to set those up either?  
 4 A. How long it took them to  
 5 set those up, it wasn't part of my inquiry, no. I  
 6 think they're still setting them up obviously.  
 7 325 Q. Because it takes a fair  
 8 amount of time to do so?  
 9 A. Because technology  
 10 changes.  
 11 326 Q. Right.  
 12 A. Yeah.  
 13 327 Q. And, in fact, everything  
 14 is preparing for notice-and-notice to come into  
 15 effect in January?  
 16 A. Well, that is certainly  
 17 an issue, a hot issue out there in ISP land, yes.  
 18 328 Q. And people are setting up  
 19 ISPs or setting up systems in order to implement a  
 20 notice-and-notice when it comes into place?  
 21 A. Most of them are setting  
 22 up ACS.  
 23 329 Q. And it is taking some  
 24 time in order to do that, to set up those systems?  
 25 Or do you know?

1 the systems, do you know the systems that Bell has  
 2 in place to respond to such requests?  
 3 A. Do I know the systems  
 4 they have in place? Sorry.  
 5 321 Q. Do you know what internal  
 6 data structures, computer systems that they have  
 7 in place in order to respond to such requests?  
 8 A. Generally in these six  
 9 examples, or the seventh that's in the briefcase,  
 10 so to speak, generally, yes, I think some of the  
 11 ISPs actually look at it as confidential. I  
 12 know --  
 13 322 Q. Okay, so what -- Bell,  
 14 for example, what does Bell have by way of  
 15 software when you contact them and say, "I would  
 16 like to know this", what do they run in order to  
 17 get it to you, do you know?  
 18 A. I'm not sure what  
 19 software applications they run internally.  
 20 They're probably some proprietary softwares,  
 21 there's probably -- I mean, in historical data  
 22 there'd probably be the legacy systems, there  
 23 would be live systems for billing.  
 24 323 Q. But you don't know that  
 25 side of the question?

1 A. No, I think it's a  
 2 priority issue.  
 3 330 Q. But do you know the  
 4 technicalities of how to set those up for a  
 5 particular ISP? I don't want to get again --  
 6 A. Yeah, we don't need to go  
 7 down that road, I'm not a technician.  
 8 331 Q. Okay. That's fine.  
 9 Okay, so when you look at paragraph 26 then --  
 10 A. Okay.  
 11 332 Q. -- and when you talk  
 12 about some data with respect to customer  
 13 information, requests for customer information to  
 14 telecommunication service providers, do you know  
 15 which telecommunication service providers you're  
 16 talking about there?  
 17 A. Do I know which?  
 18 333 Q. Right. Are you talking  
 19 about -- or I assume you're getting this  
 20 information from the articles and the --  
 21 A. Yes.  
 22 334 Q. -- the House of  
 23 Commons --  
 24 A. Same thing everybody is  
 25 getting them from.

1 335 Q. Okay. But you don't know  
2 -- when you talk about the telecommunication  
3 service providers who faced those requests,  
4 whether those were -- that information comes from  
5 Bell, Rogers, Telus, Execulink --

6 A. I think the only one who  
7 had tracked data, or actually released data  
8 relating to the numbers of inbounds, inbound  
9 requests that they had received, was either Telus  
10 or Rogers. The other teleco's wouldn't release  
11 that information. And I think --

12 336 Q. But in terms of what  
13 makes up these requests -- the information was  
14 provided on a consolidated basis?

15 A. My understanding is yes.

16 337 Q. To the Privacy  
17 Commissioner?

18 A. Correct.

19 338 Q. On behalf of four  
20 telecommunication service providers, or do you  
21 know?

22 A. I don't know.

23 339 Q. Okay. If you look at  
24 paragraph 27, you say:

25 "Canadian ISPs have also

1 A. Sorry, I knew when?

2 343 Q. At the time you swore  
3 this affidavit.

4 A. At the time I swore the  
5 affidavit, well, that was on July 30.

6 344 Q. Right. And you had read  
7 Mr. Gaudrault's affidavit that said that in a  
8 two-year period they had received 52 requests?

9 A. I don't know when I  
10 received Mr. Gaudrault's affidavit.

11 345 Q. I thought you agreed with  
12 me at the outset that you had read Mr. Gaudrault's  
13 affidavit before preparing yours. That's fair?

14 A. Yes, well, then I guess,  
15 yes, I did.

16 346 Q. And so you knew that they  
17 had only received 52?

18 A. Mm-hmm.

19 347 Q. Did you know that they  
20 did not participate in voluntary  
21 notice-and-notice?

22 A. That's -- no, I did not,  
23 but I would assume that was such a low number,  
24 those would be strictly limited to law  
25 enforcement, criminal requests, as opposed to

1 been participating in  
2 voluntary  
3 notice-and-notice systems  
4 for over a decade." (As  
5 read)

6 Do you mean all Canadian ISPs,  
7 or some Canadian ISPs?

8 A. Some. So just Canadian  
9 ISPs.

10 340 Q. Right.

11 A. And I think that ISP may  
12 this month, and next month, it may say no.

13 341 Q. Right, because the  
14 notice-and-notice, as you note here, is voluntary  
15 until such time as January 1 rolls around?

16 A. Yeah, well, that's just  
17 even -- prior to that, you know, the U.S. agencies  
18 or monitoring companies, studios, would transmit  
19 to Canada and hope, you know, that they would  
20 retransmit them. And I think in a lot of cases  
21 they did. The big proponents of notice-and-notice  
22 worldwide is Warner.

23 342 Q. And you knew at the time  
24 that you swore this affidavit that TekSavvy had  
25 stated that it received a total of 52 requests?

1 taking on the expense of putting in a system in  
2 place for companies like me to talk to its system  
3 through computer languages, and facilitate all of  
4 this in an automated fashion.

5 348 Q. And, in fact,  
6 Mr. Gaudrault, in his affidavit, says that those  
7 were law enforcement requests, and that they --

8 A. That's right. Actually,  
9 he does. That's right.

10 349 Q. Right. So you knew that,  
11 and you knew in other words that the information  
12 that you provide in paragraph 27 does not relate  
13 to TekSavvy?

14 A. I think 27 -- I mean, you  
15 can read that a hundred different ways. I mean,  
16 the way I'm going to interpret that, or included  
17 it, was simply to advise the Court that there  
18 already is a system in place, this is already a  
19 practice in place in most Canadian ISPs, most as  
20 in being the major companies.

21 350 Q. The larger ones?

22 A. The larger ones. It's  
23 where most of the traffic is.

24 351 Q. Okay.

25 A. You know, an ISP on Bell

1 Al (ph), I would be surprised if they had a  
2 request yet.  
3 352 Q. But what I'm just sort of  
4 saying is that the information in 27, when you  
5 talk about Canadian ISPs, and the  
6 notice-and-notice system --  
7 A. Yeah.  
8 353 Q. -- that does not apply to  
9 TekSavvy. That's fair to say? When you say  
10 "Canadian ISPs have been participating", you knew  
11 that that didn't apply to TekSavvy?  
12 A. When was this article  
13 printed?  
14 354 Q. This isn't an article.  
15 I'm looking at --  
16 A. Well, no, the information  
17 is out of an article.  
18 355 Q. Oh, like Exhibit Q?  
19 A. Is that what it is?  
20 356 Q. I'm really just talking  
21 about the affidavit that you swore.  
22 A. Mm-hmm. What was the  
23 article? Copy of the transcript was --  
24 357 Q. You talk about a  
25 transcript from 2011 relating to Bell's estimates

1 of requests.  
2 A. Okay, yes.  
3 358 Q. So I'm just talking about  
4 -- the paragraph you know --  
5 A. Yeah, I probably didn't  
6 consider it.  
7 359 Q. You'll agree, at least as  
8 of now, that this paragraph 27 doesn't apply to  
9 TekSavvy?  
10 A. As we're speaking here  
11 now, sure I would say TekSavvy wasn't a  
12 participant in the notice-and-notice because there  
13 would be a cost that they would have to take on to  
14 service. Has TekSavvy been contacted, I don't  
15 know, I can only guess.  
16 360 Q. You don't have to  
17 guess --  
18 A. Yes, I'm not going to,  
19 that's --  
20 361 Q. We don't want you to  
21 guess. But you also knew, from reading  
22 Mr. Gaudrault's affidavit, that the request was  
23 unique in coming from a private --  
24 A. Yeah, I don't know if  
25 that's fact or not, I don't see their inbounds. I

1 mean, that's what he states, but I don't know if  
2 that's --  
3 362 Q. Do you have any reason  
4 whatsoever to suggest that Mr. Gaudrault was not  
5 telling the truth according to his affidavit?  
6 A. No, but based on what I  
7 do know, I would find it odd.  
8 363 Q. But that's not something  
9 you commented on in your affidavit?  
10 A. No, it's a personal  
11 opinion.  
12 364 Q. And it's not something  
13 that Mr. Gaudrault was cross-examined on  
14 yesterday?  
15 A. That's correct.  
16 365 Q. Okay. When you look at  
17 paragraph 29, when you state:  
18 "Based on my  
19 investigations, which  
20 included conversations  
21 with employees of ISPs, I  
22 was advised that it is a  
23 simple process for ISPs  
24 to correlate an IP  
25 address with the

1 subscribers' contact  
2 information, and that  
3 this information is  
4 readily available." (As  
5 read)  
6 Again, this -- the information  
7 in this section isn't based on your own expertise  
8 or experience, but rather on the basis of  
9 conversations that you've had with others?  
10 A. It would be a collection  
11 of material, court documents, court records,  
12 conversations with other lawyers, other  
13 investigators, other monitoring companies.  
14 366 Q. Okay. So it included  
15 numerous conversations, but everything else we  
16 don't -- it's just whatever you've done in your  
17 investigations, and we don't have that information  
18 in this affidavit?  
19 A. Okay, but based on my  
20 investigations, I'm not -- we're not limited here  
21 to TekSavvy, you know --  
22 367 Q. No, no, I'm just trying  
23 to figure out what it is you're speaking from.  
24 Are you speaking from your experience and  
25 expertise?

1 A. Yes, I'm speaking from my  
 2 experience generally.  
 3 368 Q. Okay. But you're saying  
 4 you're not providing expert affidavit evidence  
 5 with respect to this?  
 6 A. No. I was waiting for  
 7 that, no.  
 8 369 Q. Okay. Some fine lines  
 9 being drawn perhaps, but we'll -- I mean, we're  
 10 obviously going to leave that for another day.  
 11 In terms of the discussions,  
 12 did anyone at TekSavvy say, "It is a simple  
 13 process for ISPs to correlate an IP address with  
 14 subscribers' contact information"?  
 15 A. I would like to answer  
 16 that when I have my notes in front of me.  
 17 370 Q. Okay.  
 18 A. That may have been said.  
 19 371 Q. You don't recall?  
 20 A. I don't recall. It's  
 21 been -- I mean --  
 22 372 Q. And were you talking to  
 23 these people -- when you talked to them --  
 24 A. Yeah.  
 25 373 Q. -- were you talking about

1 come up. But from a convenience perspective, if  
 2 you want to provide them later, we can do that.  
 3 MR. ZIBARRAS: Okay, I  
 4 understand these are the same notes that you said  
 5 you had to go through 600 documents with access,  
 6 so.  
 7 THE WITNESS: Yeah.  
 8 U/A MR. ZIBARRAS: We're going to  
 9 -- I mean, leave it with us.  
 10 THE WITNESS: What they are  
 11 are text documents, scratch pads.  
 12 MR. MCHAFFIE:  
 13 375 Q. Right. You note in  
 14 paragraph 31, you talk about the system that Shaw  
 15 Cablesystems -- actually, let me just make it  
 16 clear, you say:  
 17 "I was advised by Garrett  
 18 Bastian of Shaw  
 19 Cablesystems of the  
 20 typical process an ISP  
 21 undergoes." (As read)  
 22 Was Mr. Bastian talking about  
 23 Shaw Cablesystems' process, or was he talking  
 24 about the typical process? Do you know?  
 25 A. The typical process.

1 how long would it take to get information back  
 2 with respect to either 4,000 or 2,000 IP  
 3 addresses?  
 4 A. Yes.  
 5 374 Q. So you said you asked  
 6 them, "How long would it take me if I had a list  
 7 of 4,000 IP addresses", and they provided a  
 8 response that said, "That would be easy"?  
 9 A. Yeah, in general terms,  
 10 yes, that was typically the results that I got.  
 11 MR. MCHAFFIE: Okay. So I  
 12 think I need the notes then, if that's your  
 13 evidence. I think I need the notes of the  
 14 discussions that you had.  
 15 THE WITNESS: That's what I  
 16 was going to ask.  
 17 MR. ZIBARRAS: All right.  
 18 We'll take that under advisement because this is a  
 19 cross-examine.  
 20 MR. MCHAFFIE: No, but that's  
 21 not an undertaking, he has the notes here with him  
 22 today, he has brought them to the  
 23 cross-examination, he has advised that they are  
 24 relevant, but I'm saying -- I'm saying now I will  
 25 ask for production, and I will wait while they

1 376 Q. Okay. And --  
 2 A. All persons that I spoke  
 3 to had all said that the process is typically the  
 4 same from ISP to ISP.  
 5 377 Q. So they all have a --  
 6 A. The software may be  
 7 different, their structure, their infrastructure  
 8 may be a little different, but the means and the  
 9 ways or the method to reconcile an ISP address to  
 10 a subscriber account was similar.  
 11 378 Q. Okay. When you say a  
 12 "data bank" --  
 13 A. Yes.  
 14 379 Q. -- are you -- what are  
 15 you talking about there? Are you talking about  
 16 like something in a database program, or are you  
 17 talking about something that's simply in a text  
 18 file or a log file?  
 19 A. It sounds like it's more  
 20 of a text file, or it's some type of log files.  
 21 380 Q. Okay. So you're just  
 22 talking generally about log files. So they have  
 23 the data, in other words?  
 24 A. They have the data, yes.  
 25 381 Q. Okay. So it is not

1 necessarily a data bank that is searchable by  
 2 inputting an IP address, it is a log file that  
 3 has --  
 4 A. Well, I'm not saying that  
 5 the GUI or the interface to search that log  
 6 file --  
 7 382 Q. Well, you say that the --  
 8 A. -- not capable to accept  
 9 an IP address.  
 10 383 Q. Well, you say:  
 11 "Once provided with the  
 12 IP address, the ISP will  
 13 input the IP address and  
 14 the associated timestamp  
 15 into it's data bank." (As  
 16 read)  
 17 A. Yes.  
 18 384 Q. So if the data bank is a  
 19 text file, how do you input the IP address --  
 20 A. Conduct a search against.  
 21 385 Q. The IP address and the  
 22 associated timestamp --  
 23 A. Could be --  
 24 386 Q. -- simply in the text  
 25 file?

1 expertise, it's saying, "I'm just reporting  
 2 whatever Mr. Bastian and others said to me"?  
 3 A. Yeah, I think he's  
 4 generally saying it's basically a Google search  
 5 against their internal company system. If the  
 6 data was old, it probably involved different  
 7 databases, different systems that they have to go  
 8 to, when the data is live, for billing purposes.  
 9 391 Q. Okay. And in terms of  
 10 all of this discussion of the process --  
 11 A. Mm-hmm.  
 12 392 Q. -- are you taking issue  
 13 -- do you, based on your facts and information,  
 14 take issue with the process that TekSavvy, based  
 15 on its knowledge of its systems, undertook to try  
 16 to reconcile? Or do you have --  
 17 A. Well, nobody would know  
 18 the TekSavvy systems better than TekSavvy.  
 19 Certainly the documentation that they provided is  
 20 very -- I don't know what the word would be --  
 21 "confusing" or "curious". I mean, it requires a  
 22 further inspection.  
 23 393 Q. I think you said that  
 24 you're not a technical person --  
 25 A. No, but I can understand

1 A. It could be a -- I'm not  
 2 a programmer.  
 3 387 Q. Okay.  
 4 A. If that's what we're  
 5 looking for.  
 6 388 Q. I guess -- yeah, what I'm  
 7 trying to say is -- I mean, you sort of -- you  
 8 said that the retrieval process is quick and easy.  
 9 Right?  
 10 A. Yeah, a lot of the time I  
 11 speak to people who have -- and that's what they  
 12 -- they program in Java. Well, I'm not a Java  
 13 person or a programmer, so I take what they say as  
 14 I interpret, and I clarify it with them, and I  
 15 commit it to my notes and move on to the next  
 16 topic.  
 17 389 Q. So "The retrieval process  
 18 is quick and easy" are Mr. Bastian's words or  
 19 yours?  
 20 A. I don't know unless we  
 21 get a copy of my notes and look and see exactly  
 22 what he said. If that's what I'm saying in here  
 23 then I'm going to say yes.  
 24 390 Q. But, again, this isn't a  
 25 question of it being an opinion based on your

1 billing and time. I mean, I've been at this for  
 2 20 years.  
 3 394 Q. Right. In that 20 years,  
 4 interesting question, in that 20 years, how many  
 5 times have you asked a Canadian ISP to produce  
 6 names associated with 4,000 IP addresses for a  
 7 private company?  
 8 A. Well, I don't know if  
 9 that's the right way to ask it. I mean, this is a  
 10 -- this is a unique case here in Canada --  
 11 395 Q. Sorry, this is a unique  
 12 case in Canada?  
 13 A. Yes, I would say this is  
 14 unique case in Canada's civil sector, yes.  
 15 396 Q. So the answer is, "You  
 16 have never asked a Canadian ISP" --  
 17 A. No, I've never asked a  
 18 Canadian ISP to reconcile 4,000 addresses.  
 19 397 Q. Okay.  
 20 A. I have asked them to  
 21 reconcile addresses though in the past.  
 22 398 Q. Right. In, for example,  
 23 the Quebec proceeding that you refer to in  
 24 paragraph 33?  
 25 A. Yes.

1 399 Q. Okay. So let's take a  
 2 look at that. Now paragraph 33, Mr. Moore  
 3 represented Voltage. Were you -- you were  
 4 involved in that proceeding?  
 5 A. Yes.  
 6 400 Q. Okay. And what -- the  
 7 number of IP addresses in that proceeding, at  
 8 issue in that proceeding, were how many?  
 9 A. I don't remember.  
 10 401 Q. A couple of dozen?  
 11 A. I don't remember.  
 12 402 Q. You don't remember?  
 13 A. A couple dozen, was that  
 14 25? That number doesn't sound right.  
 15 403 Q. Less or more, do you  
 16 know? You don't remember?  
 17 A. I don't really remember,  
 18 no.  
 19 404 Q. Not in the thousands?  
 20 A. Oh heavens, no, not  
 21 that...  
 22 405 Q. Now --  
 23 A. I think the file exists,  
 24 but what the request is for, I mean, I don't know.  
 25 See, I don't get involved, you know, with that.

1 is what happened in Quebec, and that's on the  
 2 record. They were all done on consent.  
 3 410 Q. The orders were actually  
 4 --  
 5 A. So he may have told me --  
 6 411 Q. They were done unopposed,  
 7 just for -- I mean, for us that matters, perhaps  
 8 it's a technicality. But they were done  
 9 unopposed, yes.  
 10 A. Okay.  
 11 412 Q. And now -- but what  
 12 you're talking about here is stuff that's come  
 13 from Mr. Moore?  
 14 A. And he has probably told  
 15 me on the phone, and sent me a copy of the  
 16 unopposed consent order.  
 17 413 Q. The order. But, right,  
 18 the order says nothing about the ISPs requiring a  
 19 fee, or about any communications that they had  
 20 with the ISPs after the order was issued?  
 21 A. I don't know, we would  
 22 have to go over and take a look at Exhibit U.  
 23 414 Q. Right. Well, Exhibit U  
 24 is simply the order.  
 25 A. Okay.

1 406 Q. Right. And so here what  
 2 you're reporting on is Mr. Moore's discussion with  
 3 third parties? Sorry, are you thinking or are you  
 4 waiting for --  
 5 A. Oh, I thought you guys  
 6 were talking.  
 7 407 Q. Sorry. No, no, no, my  
 8 question was -- I was just still waiting for an  
 9 answer -- was: What you're saying here is that  
 10 you're reporting on conversations between  
 11 Mr. Moore and third parties?  
 12 A. I think it's a  
 13 combination of conversations and documentary  
 14 evidence in the court files.  
 15 408 Q. No, it says -- fair  
 16 enough, and let me just make clear what I'm  
 17 talking about. When you talk about, for example,  
 18 "I'm advised by Greg Moore", and when you talk  
 19 about all of the following stuff --  
 20 A. Yes.  
 21 409 Q. -- that's all just talk,  
 22 you are basing that on information that Mr. Moore  
 23 provided to you?  
 24 A. Well, I think he's  
 25 telling me that the result of the consent orders

1 415 Q. Or it's actually one page  
 2 from the order.  
 3 A. Yeah, I wasn't party to  
 4 those conversations or discussions or negotiations  
 5 with the ISPs, so I don't know what fee process  
 6 they had in place.  
 7 416 Q. Okay.  
 8 A. So I couldn't really  
 9 answer that. I can just tell you what Mr. Moore  
 10 told me, and what the documents say.  
 11 417 Q. Okay. Do you know when  
 12 Mr. Moore told you that?  
 13 A. You know, you're asking  
 14 me for a lot of very specific dates, I have a hard  
 15 time with last month let alone two years ago.  
 16 418 Q. I don't -- let me show  
 17 this to you. This is an e-mail that appears to be  
 18 an e-mail between you and Mr. Misur.  
 19 A. Oh, nice.  
 20 419 Q. That might help things.  
 21 It's dated October 16, 2012. So do you know at  
 22 this time whether as of October 16, 2012 you had  
 23 recommended that Voltage be the person --  
 24 A. I don't know.  
 25 420 Q. Okay. And you say,

1 "Thanks, Patrick", and there's an exchange here.  
 2 A. Yeah.  
 3 421 Q. But the top e-mail that  
 4 we're looking at says:  
 5 "Thanks, Patrick, I am  
 6 working with a 60-day  
 7 backdate of IP addresses,  
 8 basically August 1 to  
 9 October 8, 2012." (As  
 10 read)  
 11 A. I think TekSavvy is aware  
 12 that we're already in discussions at this point by  
 13 the sounds of it.  
 14 422 Q. Well, there has been a  
 15 lower exchange.  
 16 A. Yeah.  
 17 423 Q. Other than that, I'm not  
 18 sure what knowledge we're talking about, but.  
 19 A. Yeah, I mean, we really  
 20 have to pull the whole thread up here and sit down  
 21 and take a look from start to finish.  
 22 424 Q. Sure. So let's scroll  
 23 her down to the bottom.  
 24 A. I mean, I've got the same  
 25 thread if anybody is --

1 make it easier then just sort of having it up, or  
 2 maybe we can --  
 3 THE WITNESS: Well, we had --  
 4 yeah, I don't want to say if I've got it or not.  
 5 I don't know if I've got it here on my local  
 6 system or on our local web --  
 7 MR. MCHAFFIE:  
 8 429 Q. Yeah, we could e-mail it  
 9 to you. Okay.  
 10 A. That'd be great.  
 11 MR. MCHAFFIE: Forward just  
 12 the -- just the attachment.  
 13 MR. ABRAMSON: In fact, I have  
 14 the e-mail address because of this attachment.  
 15 MR. MCHAFFIE: We probably  
 16 could have gone off the record for some of this.  
 17 MR. ABRAMSON: Assuming it's  
 18 the same as logan@canipre.com?  
 19 THE WITNESS: Yup.  
 20 MR. MCHAFFIE:  
 21 430 Q. Okay.  
 22 A. Yes, I see the -- yeah.  
 23 431 Q. Have you got that now?  
 24 A. I seem to have it, yes.  
 25 432 Q. Okay. So --

1 425 Q. Yeah, well, we can do  
 2 that. I mean, if you got it -- so I'm not looking  
 3 at it upsidedown.  
 4 A. I don't have  
 5 connectivity.  
 6 426 Q. Yeah, that's the thing.  
 7 Right.  
 8 MR. WEISSMAN: Should I go get  
 9 the Wifi password?  
 10 THE WITNESS: That'd be great.  
 11 THE REPORTER: The Wifi  
 12 password, that's the password for the Wifi.  
 13 THE WITNESS: Okay. What's  
 14 his e-mail address by chance? Is it "pmisur" or  
 15 is it "patrick."?  
 16 427 Q. "Pmisur".  
 17 A. P-m-i-s-u-r?  
 18 428 Q. Yes. So have you found  
 19 an exchange between yourself, Mr. Misur, and  
 20 Mr. Tacit in the October --  
 21 A. No, I have not yet.  
 22 MR. ZIBARRAS: Do you guys  
 23 have the e-mail?  
 24 MR. MCHAFFIE: Yeah, we've got  
 25 the e-mail exchange. I think we're just trying to

1 A. But not -- I have -- like  
 2 I have my copy from Pat Misur, IT manager,  
 3 TekSavvy Solutions.  
 4 433 Q. Good.  
 5 MR. ZIBARRAS: You got your  
 6 copy now?  
 7 THE WITNESS: It looks like it  
 8 -- yeah.  
 9 MR. ZIBARRAS: Or is this the  
 10 one they just sent you?  
 11 THE WITNESS: No, no, this is  
 12 my copy.  
 13 MR. ZIBARRAS: Okay.  
 14 MR. MCHAFFIE:  
 15 434 Q. Okay.  
 16 A. I think I was introduced  
 17 to Patrick by Christian Tacit.  
 18 435 Q. Right. If you look at  
 19 the -- scroll to the first text at the bottom of  
 20 the e-mail exchange, it says:  
 21 "Mr. Logan, I am counsel  
 22 to TekSavvy. Kindly  
 23 advise me of the account  
 24 information that you are  
 25 seeking and the reason

1 for the request, and then  
 2 I will be able to respond  
 3 to you regarding how we  
 4 can proceed." (As read)  
 5 A. Okay.  
 6 436 Q. That's from Mr. Tacit to  
 7 you.  
 8 A. Okay.  
 9 437 Q. And then you have an  
 10 exchange with him saying:  
 11 "We will be seeking the  
 12 disclosure of accounts,  
 13 subscriber information,  
 14 and so forth, and I would  
 15 like some understanding  
 16 of how it is that  
 17 TekSavvy will determine  
 18 the information from a  
 19 technical point of view."  
 20 (As read)  
 21 A. Mm-hmm. What was the  
 22 date of that? Is that November 10?  
 23 438 Q. No, I think we're talking  
 24 October is the range here.  
 25 A. Okay. All right.

1 MR. ABRAMSON: I could, yes.  
 2 MR. GAUDRAULT: We have the  
 3 e-mail address for the front desk?  
 4 THE REPORTER: I am just going  
 5 to go off the record?  
 6 MR. MCHAFFIE: Sorry. Yes,  
 7 please.  
 8 --- (Off-record discussion)  
 9 MR. MCHAFFIE:  
 10 440 Q. Have you had the  
 11 opportunity to review that exchange, or do you  
 12 recall it?  
 13 A. Oh, yes, I do recall it.  
 14 441 Q. Okay. And so if you go  
 15 to the top, in terms of providing information, the  
 16 very top e-mail in that chain says:  
 17 "Thanks, Patrick, I'm  
 18 working with a 60-day  
 19 backdate of addresses.  
 20 Can you clarify the  
 21 following points for me?"  
 22 And then I'm reading the third  
 23 and fourth point:  
 24 "What is the turnaround  
 25 time for a single IP

1 439 Q. And Mr. Tacit responds:  
 2 "Mr. Logan, before we can  
 3 advise on the process and  
 4 TekSavvy's position, or  
 5 how to assist you, we  
 6 need to understand why  
 7 the request is being  
 8 made, and the information  
 9 is being sought. Please  
 10 advise." (As read)  
 11 A. Mm-hmm.  
 12 MR. MCHAFFIE: And what I'm  
 13 thinking perhaps, Mr. Zibarras, is that this is  
 14 something that we can then print at some point and  
 15 make as an exhibit as it was the exchange, rather  
 16 than having to read it all into the record.  
 17 MR. ZIBARRAS: Sure.  
 18 MR. MCHAFFIE: And even though  
 19 we may have to do it kind of somewhat  
 20 retroactively.  
 21 THE REPORTER: We can always  
 22 send this e-mail to front desk and they can print  
 23 a copy while we're continuing.  
 24 MR. MCHAFFIE: Great. Can you  
 25 --

1 address search, and what  
 2 is your estimated  
 3 turnaround time for a  
 4 block of 100 IP addresses  
 5 to subscriber account  
 6 identifications?" (As  
 7 read)  
 8 Fair to say that at least in  
 9 this exchange of e-mails, you nowhere suggest that  
 10 you might be looking for a block of 2 or 4,000 IP  
 11 addresses?  
 12 A. I'm not sure if at this  
 13 point in time we knew.  
 14 442 Q. Okay. But I understand  
 15 that you had said that in communications with the  
 16 IP -- it says "ISPs on the list", that you have in  
 17 your affidavit --  
 18 A. Yeah.  
 19 443 Q. -- that you were  
 20 expressly talking about thousands of IP addresses?  
 21 A. I don't know. I think I  
 22 was asking about one address than a block of  
 23 addresses.  
 24 444 Q. Okay. And just for  
 25 clarity --

1 A. The answer to that would  
2 tell you the answer for the rest of the  
3 assignment.  
4 445 Q. Sorry, you're saying  
5 looking up for a block of 1 and 100 would  
6 necessarily give the answer for looking up --  
7 A. It would tell me in that  
8 --  
9 446 Q. -- 4,000?  
10 A. It would describe their  
11 process and therefore you would be able to  
12 calculate how long it would take to do something.  
13 447 Q. The process for looking  
14 up one may be different than the process for  
15 looking up 100?  
16 A. I don't know.  
17 448 Q. And the process for  
18 looking up a 100 may be different than the process  
19 for looking up 2,000 or 4,000?  
20 A. It could be a batch, it  
21 could be importing an Excel file for all I knew at  
22 that point in time.  
23 449 Q. And, again, to your  
24 recollection today, subject to what we may find in  
25 your notes, do you recall speaking to ISPs and

1 It's quite possible -- I think you said that there  
2 were conversations as well as e-mails. I've got  
3 this e-mail, if this e-mail is the universe of  
4 substantive discussion with TekSavvy -- is it?  
5 MR. ZIBARRAS: Is it the  
6 universe of e-mails or discussions? I don't know  
7 why we're spending time on this. But is it --  
8 let's just get through this.  
9 MR. MCHAFFIE: But I'm  
10 cross-examining him on the affidavit, the  
11 information that he has put forward regarding  
12 communications.  
13 MR. ZIBARRAS: No, I  
14 understand.  
15 MR. MCHAFFIE: So that is why  
16 we are going into it.  
17 THE WITNESS: No, I've not had  
18 anymore e-mails with TekSavvy.  
19 MR. MCHAFFIE:  
20 456 Q. Okay. And in terms of  
21 discussions, did you have any discussions --  
22 A. Not until yesterday, or,  
23 sorry, Bram (ph), the other night, and the  
24 director of intelligence there, Andre?  
25 MR. ABRAMSON: Sorry, if...?

1 expressly asking them about the lookup of 2,000  
2 names or 4,000 names?  
3 A. I'm sure I have.  
4 450 Q. Sorry, not names, IP  
5 addresses?  
6 A. Yes, definitely I have.  
7 451 Q. But do you recall whether  
8 you did so with TekSavvy? It doesn't appear so  
9 from this exchange.  
10 A. Well, I mean, you're  
11 reading it, so, I mean, you got the answer.  
12 452 Q. Not in this -- sorry,  
13 what I have is this e-mail exchange.  
14 A. Yeah.  
15 453 Q. Right.  
16 A. Then I have no more -- I  
17 mean, this is -- what you see is the universe of  
18 --  
19 454 Q. Okay, so that's it.  
20 Okay, that's fine.  
21 A. Yeah.  
22 455 Q. That's fine. I'm sorry,  
23 I'm not trying to be difficult with you, and I  
24 hope you're not trying to be difficult with me, I  
25 was asking whether you recall having done so.

1 THE WITNESS: I'm sorry.  
2 MR. MCHAFFIE:  
3 457 Q. In terms of substance,  
4 not just "Hi, my name is", but in terms of  
5 substance --  
6 A. Yeah, no that's --  
7 458 Q. This is it?  
8 A. You've got the world  
9 right there.  
10 459 Q. Okay.  
11 A. Shake it up.  
12 MR. ZIBARRAS: The e-mail is  
13 everything?  
14 THE WITNESS: Between me and  
15 Patrick, this is it.  
16 MR. ZIBARRAS: There were no  
17 discussions?  
18 THE WITNESS: No, we had -- we  
19 had telephone discussions.  
20 MR. MCHAFFIE:  
21 460 Q. But were they substantive  
22 or were they --  
23 MR. ZIBARRAS: What do you  
24 mean by "substantive"?  
25 MR. MCHAFFIE:

1 461 Q. Did they talk about more  
2 than simply "Hi, my name is" -- sorry, let me put  
3 it this way: Did any request for information,  
4 going from you to TekSavvy, asking about thousands  
5 of IP addresses, be reflected in discussions that  
6 are not in this e-mail?

7 A. To what, retrieve them  
8 from the corporate recording system, no. So don't  
9 waste your time. See, at this point in time,  
10 Mr. McHaffie, with all due respect, I'm the  
11 investigator. You got lawyers, you got studio  
12 guys, you got the U.S. lawyers, you got God knows  
13 who, what's going on, you know?

14 I remember that we had -- we  
15 were about to file, we were going to file, we had  
16 an agreement with TekSavvy -- that's what I kind  
17 of recall -- and then at the last minute they did  
18 a whole 360, and this is where we are today.  
19 That's what I remember.

20 I remember talking to  
21 Christian, I think he called me back in the  
22 office, or he wrote back to me. And Patrick and I  
23 were initially talking, or I initially spoke to  
24 him. I mean, it all -- it's kind of blurry.  
25 Like, you know, he e-mailed, I called. But it all

1 recollection.

2 469 Q. Fantastic. That's great.  
3 Okay.

4 MR. ZIBARRAS: Do you mind if  
5 we take a break?

6 MR. MCHAFFIE: No, absolutely.  
7 Sure. That's good.

8 MR. ZIBARRAS: I think we've  
9 been going on for a while.

10 --- Break taken at 3:13 p.m.

11 --- Upon resuming at 3:23 p.m.

12 MR. MCHAFFIE: We're going to  
13 -- we've now, thanks to the good graces of ASAP  
14 Reporting, have a printout of the e-mail exchange  
15 that we had just been speaking to on the record.  
16 And we'll mark that as Exhibit 1 to Mr. Logan's  
17 examination.

18 EXHIBIT NO. 1: E-mail  
19 thread between Mr. Logan  
20 and Mr. Misur

21 MR. MCHAFFIE: And then after  
22 discussion with counsel, we will mark the bundle  
23 of documents related to the Rogers, Bell, and  
24 Telus websites that we addressed earlier in the  
25 examination as Exhibit A for identification.

1 happened within a very short period of time.

2 462 Q. And you'll appreciate  
3 that what I'm trying to get to, you've filed  
4 information --

5 A. Yeah.

6 463 Q. -- regarding the  
7 process --

8 A. Yes.

9 464 Q. -- that ISPs used --

10 A. Yes.

11 465 Q. -- and the information,  
12 the communications that you had, and others had --

13 A. Yes.

14 466 Q. -- with respect to that  
15 issue?

16 A. Yes.

17 467 Q. And I'm trying to get to  
18 what information you conveyed to them, what  
19 information they conveyed to you.

20 A. Sure.

21 468 Q. That's all. I'm sorry if  
22 you feel that's wasting your time --

23 A. No, no, I didn't say it's  
24 wasting your time, or my time. That e-mail, I  
25 believe, is the world, to the best of my

1 EXHIBIT NO. A: Documents  
2 related to Rogers, Bell,  
3 and Telus websites (for  
4 identification)

5 MR. MCHAFFIE:

6 470 Q. So we were looking at  
7 paragraph 33 and the question of Quebec and  
8 Mr. Moore. I just want to clarify one thing,  
9 towards the end of that paragraph, you say that  
10 the ISPs that Mr. Moore dealt with were a 3Web  
11 Corp., Access Communications, CAN Inc., and  
12 Distributel. In each case the required  
13 information was provided without charge, the  
14 orders that the ISP were responding to in those  
15 instances are attached as Exhibit U.

16 Do you want to turn up Exhibit  
17 U? I see an order that comes out of a proceeding  
18 that I'm familiar with, but that dealt with Bell  
19 Canada, Cogeco Cable, and Vidéotron. So my  
20 question is, I guess: Where do the ISPs, 3Web  
21 Corp., Access Communications, CAN Inc., and  
22 Distributel fit into this order that you're  
23 describing?

24 A. You know, I wonder if  
25 those were some of the earlier consent to

1 disclosure matters, Quebec.  
2 471 Q. Without an order?  
3 A. No, I can't recall.  
4 472 Q. And Access  
5 Communications, as I understand it, are limited to  
6 Saskatchewan. Do you know one way or the other  
7 where that fits into this discussion with  
8 Mr. Moore in Quebec?  
9 A. No, I don't.  
10 473 Q. Do you have knowledge  
11 with respect to Access Communications of the  
12 location of operations?  
13 A. Yes, I do.  
14 474 Q. And am I right, that  
15 they're limited to Saskatchewan?  
16 A. Off the top of my head, I  
17 don't know. It's been a while since I spoke to  
18 them. I believe you're right.  
19 475 Q. Are you aware of orders  
20 that have been issued --  
21 A. "The orders that the ISPs  
22 were responding to in  
23 those instances are  
24 attached hereto as  
25 Exhibit U." (As read)

1 The orders, there looks like  
2 there's one order.  
3 476 Q. At Exhibit U, I agree.  
4 A. So, yeah, there's some  
5 court actions. They're in Quebec. I don't  
6 believe this is the universe of them here in this,  
7 in U.  
8 477 Q. So you believe there were  
9 other court orders?  
10 A. Yes, yeah.  
11 478 Q. But that you meant to  
12 attach, but didn't?  
13 A. Mm-hmm.  
14 479 Q. Sorry. Mm-hmm, yes?  
15 A. Yes. I think they're all  
16 consent orders.  
17 480 Q. Okay, but they are actual  
18 orders of a court as opposed to merely agreement  
19 on the part of --  
20 A. That's correct. Yeah, it  
21 wasn't given at the lunch time at the backdoor,  
22 anything like that.  
23 481 Q. Well, they can be given  
24 regardless of the time of day or the location,  
25 they can be given without -- without a court

1 order, as we looked at 1.2 million, and we're --  
2 that's sort of a separate issue. Your  
3 understanding that you're talking about here is  
4 orders, and that there are orders that you meant  
5 to attach, but did not?  
6 A. Yeah.  
7 482 Q. Can you either produce or  
8 give a corrected version of --  
9 A. Clarify that? Most  
10 definitely.  
11 MR. MCHAFFIE: And,  
12 Mr. Zibarras, is that a fair --  
13 U/A MR. ZIBARRAS: That's fine.  
14 MR. MCHAFFIE:  
15 483 Q. And, again, in terms of  
16 the number of IP addresses that -- at least in  
17 Exhibit U, Bell Canada, Cogeco, and Vidéotron were  
18 being asked to produce, do you know the  
19 approximate numbers? Was that in the -- that was  
20 in the well below -- well below --  
21 A. It was below.  
22 484 Q. Well below 100?  
23 A. I wouldn't say "well  
24 below". I mean, what's well below 100?  
25 485 Q. Below 30?

1 A. I think there's one case  
2 where there was 30. I think there's a couple of  
3 cases where there's 50 or 75.  
4 486 Q. So there were orders that  
5 you had obtained?  
6 A. There were -- these,  
7 yeah.  
8 487 Q. Well, perhaps we will --  
9 you can identify that in the information that you  
10 provide.  
11 A. Sure.  
12 488 Q. Okay, paragraph 35 and  
13 forwarding -- I'm sorry, when we say under that  
14 heading, 35 to 38, again, you're not providing --  
15 you don't purport to provide opinion evidence with  
16 respect to the amount of time it takes to  
17 correlate an IP address?  
18 A. No, I'm not providing an  
19 opinion. I can form an opinion after everything  
20 I've learned and been told.  
21 489 Q. But you're not being put  
22 forward as an expert witness?  
23 A. No.  
24 490 Q. At the end of  
25 paragraph 36, the second sentence of paragraph 36,

1 you say:  
 2 "It may be that TekSavvy  
 3 was, in fact, able to  
 4 process the IP addresses  
 5 much faster, potentially  
 6 in less than an hour."  
 7 (As read)  
 8 That is merely speculation on  
 9 your part?  
 10 A. Yeah, it's speculation.  
 11 I think it's a fair statement.  
 12 491 Q. And, in fact, it's  
 13 speculation that Mr. Gaudrault and Mr. Tellier are  
 14 not telling the truth to the Court in their  
 15 affidavits, so that's what that speculation is?  
 16 A. I don't believe that's  
 17 saying that in there, is it?  
 18 492 Q. Well, if they took less  
 19 than hour then they wouldn't be telling the truth  
 20 in their affidavits. That's fair?  
 21 A. I didn't have any  
 22 dealings with Mr. Gaudrault.  
 23 493 Q. But you knew his  
 24 affidavit?  
 25 A. I'm thinking back to the

1 498 Q. Mm-hmm. But what you are  
 2 talking about in this paragraph is the amount of  
 3 time that TekSavvy took to conduct the  
 4 correlation?  
 5 A. According to the  
 6 information I had, yes.  
 7 499 Q. Okay. And the  
 8 information that you had at the time that you  
 9 swore this affidavit included Mr. Gaudrault's  
 10 affidavit. That's fair to say? Yes?  
 11 A. Yes, I've already said  
 12 that.  
 13 500 Q. And it included  
 14 Mr. Tellier's affidavit?  
 15 A. Correct.  
 16 501 Q. Both of which said that  
 17 TekSavvy took well more than an hour to undertake  
 18 those correlations?  
 19 A. I don't know.  
 20 502 Q. Sorry, you don't know  
 21 that that's what those affidavits said?  
 22 A. Well, that's what the  
 23 affidavits say.  
 24 503 Q. Right. And so what  
 25 you're speculating here --

1 time that this actually happened.  
 2 494 Q. We're talking about in,  
 3 paragraph 36, the four days that passed, as you  
 4 described it -- you're talking about four business  
 5 days. That's fair to say?  
 6 A. Correct.  
 7 495 Q. And that doesn't include  
 8 either the -- it doesn't include the day on which  
 9 the information was provided?  
 10 A. Correct.  
 11 496 Q. And you don't know  
 12 whether TekSavvy was working on the weekend?  
 13 A. I don't know if they  
 14 worked around the clock, I just know that it was  
 15 done.  
 16 497 Q. And so you're talking  
 17 about the amount of time that TekSavvy actually  
 18 took to process the IP addresses, that's what you  
 19 were talking about in this paragraph?  
 20 A. I remember delivering the  
 21 evidence file, I remember there being a question  
 22 about the timestamp, UMT and GMT, I remember the  
 23 number of IP addresses. I don't remember the date  
 24 on which it happened. I remember being advised  
 25 that it was done.

1 A. Yeah.  
 2 504 Q. -- is that you are  
 3 speculating that those affidavits are untrue or  
 4 incorrect, that's what the speculation is here? I  
 5 just want to make it clear what it is you are  
 6 speculating. Is that fair, a fair statement? Are  
 7 you prepared to admit that?  
 8 A. You know, I am.  
 9 505 Q. If you look at  
 10 paragraph 38, the assumption that you have in the  
 11 second sentence of that paragraph assumes that a  
 12 single employee is required to work full-time for  
 13 four days?  
 14 A. Okay, it's -- go ahead,  
 15 continue.  
 16 506 Q. That's correct, a single  
 17 employee?  
 18 A. Assuming an employee, so,  
 19 yes, assuming one employee.  
 20 507 Q. Okay. And so the math  
 21 that you present there --  
 22 A. Yes.  
 23 508 Q. -- would be, effectively,  
 24 all you're saying is 32 hours times someone with  
 25 this annual salary, this is what the math is?

1 A. Basically that's what it  
 2 is.  
 3 509 Q. And its relevance depends  
 4 on the assumption that you make in terms of how  
 5 much work it takes?  
 6 A. Correct. Based on being  
 7 told by other ISPs doing the exact same work.  
 8 510 Q. Sorry, ISPs undertaking a  
 9 lookup of 2,000 IP addresses?  
 10 A. Per address. I think we  
 11 come into that down the road here.  
 12 511 Q. And you're aware that  
 13 TekSavvy's evidence -- you weren't here during the  
 14 examination yesterday, so I don't know if you've  
 15 been advised. Are you aware of TekSavvy's  
 16 evidence with respect to the amount time it took  
 17 them to look up a single address in response to a  
 18 law enforcement request? Are you aware of that  
 19 evidence? I don't want to get into things you  
 20 don't know about.  
 21 A. No, no, let's discuss it  
 22 though.  
 23 512 Q. No, I don't want to -- I  
 24 can't -- I'm not giving evidence, so I can't put  
 25 evidence to you. Okay. So I can put it this way

1 MR. ZIBARRAS: Hold on.  
 2 MR. MCHAFFIE:  
 3 515 Q. The exchange between you  
 4 and Mr. Misur. If he told you that it would take  
 5 ten minutes to look up, it would be in this  
 6 universe of exchanges that you had with him?  
 7 A. I'm not sure. You know,  
 8 I would think it would be, and I would like to  
 9 think it would be.  
 10 516 Q. Where else might it be?  
 11 A. Well, in his notes,  
 12 because I know I just read it.  
 13 517 Q. You just read it on  
 14 where?  
 15 A. Was that asked in a phone  
 16 call I had with Patrick Misur, where I said I  
 17 couldn't remember if we did? I mean, I --  
 18 518 Q. You are the one who is  
 19 telling me that Mr. Misur told you it would take  
 20 ten minutes.  
 21 A. Yeah.  
 22 519 Q. So, I mean, I'm afraid I  
 23 can't help you. I had thought that you had said  
 24 that Exhibit 1 was the universe.  
 25 A. Mm-hmm. Yeah, you know,

1 as a hypothetical: To the extent that TekSavvy  
 2 representatives gave evidence that when they were  
 3 looking up a single IP address, it would take  
 4 them, on the systems that they had, an hour to two  
 5 hours to undertake that single lookup, that would  
 6 be different from the information that you  
 7 received with respect to other ISPs?  
 8 A. I think Patrick himself  
 9 said it took ten minutes, Patrick Misur, their  
 10 employee.  
 11 513 Q. So what I'm saying, that  
 12 is different than the information that you  
 13 received from other ISPs?  
 14 A. No, I'm saying Patrick  
 15 Misur told me it took ten minutes to look up an IP  
 16 address. Now is the hypothetical situation -- are  
 17 we talking about an IP address from five years  
 18 ago, or are we talking about an IP address from a  
 19 video game generated by a mobile phone, Wifi  
 20 hotspot, I mean, like what's -- you know, just to  
 21 say blankly that an IP address took an hour and a  
 22 half to two hours, what are the extenuating  
 23 circumstances?  
 24 514 Q. Okay, if we can look at  
 25 Exhibit 1?

1 like if there's another way that we can come back  
 2 to this, I can open my computer and take an  
 3 hour -- right now with you guys all sitting  
 4 around -- I'll give you the answer.  
 5 520 Q. Well, I think we talked  
 6 about the notes, and your counsel has taken it  
 7 under advisement.  
 8 A. Okay.  
 9 521 Q. Okay. So --  
 10 MR. ZIBARRAS: That's what I  
 11 was trying to get at, he said he has notes, and  
 12 then he said this was the universe. I imagine  
 13 that he has both.  
 14 MR. MCHAFFIE: I'm not sure  
 15 what I can do with that, right? I'm --  
 16 MR. ZIBARRAS: I think we have  
 17 it, so we'll get you it. All right?  
 18 MR. MCHAFFIE: Okay.  
 19 MR. ZIBARRAS: But you have a  
 20 recollection today, is that what you say?  
 21 THE WITNESS: Yeah, like I  
 22 remember it started off with phone calls with --  
 23 send me to tech, and then Christian Tacit called  
 24 me, or I called him, I can't remember. That's how  
 25 the whole thing started.

1 And in there there was a phone  
2 call I had with Patrick, because I know Christian  
3 said he was going to have to call me, or e-mail  
4 me. I know he has e-mailed me, but I think I've  
5 had a conversation with him. Maybe your corporate  
6 telephone systems would have that, your bills, I  
7 mean, I don't know. Maybe my bills, I don't know.  
8 But I remember having a talk -- you know, e-mail  
9 is one thing, but sitting down talking to somebody  
10 is quite another.

11 MR. MCHAFFIE:  
12 522 Q. Interesting, actually,  
13 when you say, you know, in looking at Exhibit 1,  
14 by the time you got to the very last question in  
15 this chain, October 16 --

16 A. Mm-hmm.  
17 523 Q. -- "What is the  
18 turnaround time for a single IP address search", I  
19 take it by the time you asked that question, you  
20 did not have that information yet, or you wouldn't  
21 be asking the question. That's fair to say?

22 A. It sounds like it's one  
23 of my first -- you know what, if we're going to  
24 sit here and digest it, let's do it, let's take it  
25 apart. Okay.

1 THE WITNESS: Okay. There  
2 seems to be something that's disjointed here. You  
3 got the header information from me, it's missing  
4 from Patrick, and then it goes into a thank you.  
5 "Hello" -- okay, let's start at the back and work  
6 our way forward.

7 MR. MCHAFFIE:  
8 528 Q. That's often the way  
9 e-mails are set up, it goes from the -- you read  
10 them from the bottom up, as it were.  
11 A. So it looks like  
12 Christian and I are busy e-mailing one another on  
13 October 11. Is that what you're saying?

14 529 Q. Yes.  
15 A. Okay. And you asked me  
16 some very specific questions, and I remember those  
17 questions because I couldn't answer them. I think  
18 I say right in there:

19 "Good morning, Christian"  
20 -- "dut da dut da da" --  
21 "this will provide me  
22 with a further  
23 understanding of the  
24 amount of resources that  
25 you have available to

1 Okay, well, the answer right  
2 below it does not appear to me to have a date.  
3 Patrick's e-mail to me seems to have the date  
4 removed.

5 524 Q. It was prior to  
6 October 16?  
7 A. And before the 12th, if  
8 we look at e-mail 3.

9 525 Q. Right. So the whole  
10 exchange -- I'm not sure what the earliest date we  
11 can obtain from this exchange is, but it's in the  
12 range of October 11 to October 16.

13 A. What day of the week --  
14 what were those weekdays?

15 526 Q. Tuesday was October 16.  
16 A. Was it? Can I mark on  
17 this?

18 527 Q. It actually says it there  
19 already, sent Tuesday, October 16.

20 A. Okay, yes, okay. So the  
21 15th would be the Monday. Are we into  
22 Thanksgiving weekend then? Thirteen, 11, 12, what  
23 would the 12 be, the Friday?

24 MR. ABRAMSON: Thanksgiving  
25 2012 is Monday, October 8.

1 fulfil the order we are  
2 seeking." (As read)  
3 So I told Mr. Tacit what I was  
4 after.

5 530 Q. Right. What I'm trying  
6 to get to, and for now all I'm asking you is:  
7 You'll agree that there's nothing in this document  
8 in which Mr. Misur says that it would take ten  
9 minutes to look up an IP address and correlate it  
10 --

11 A. I don't know, because the  
12 document looks like it's disjointed, so I don't  
13 know. I don't know if I'll agree to that or not.  
14 Probably won't, to be honest with you.

15 531 Q. Okay.  
16 A. Just the way I am.

17 MR. ZIBARRAS: You know what,  
18 you have the document, I don't know why we're  
19 wasting half an hour --

20 MR. MCHAFFIE: Well, I'm  
21 telling you exactly why we're wasting it, because  
22 my friend -- the witness just said, in after  
23 having said this is the entire universe of  
24 substantive discussion --

25 MR. ZIBARRAS: Well, we

1 explained --

2 MR. MCHAFFIE: And after  
3 having said that Mr. Misur expressly told him that  
4 it took ten minutes to look up, and he made a  
5 distinct point of it, he repeated it several  
6 times --

7 MR. ZIBARRAS: Right.

8 MR. MCHAFFIE: -- we don't see  
9 it in here, and you and I know that.

10 MR. ZIBARRAS: Okay.

11 MR. MCHAFFIE: And so I need  
12 to get to this. If the witness is not prepared to  
13 admit it, then we need to know where that comes  
14 from.

15 MR. ZIBARRAS: Okay.

16 MR. MCHAFFIE: And that's what  
17 I'm trying to get to, and it's material because it  
18 goes directly to this witness' credibility.

19 THE WITNESS: Okay, so  
20 Mr. Tacit is suggesting that there would be no  
21 court costs, TekSavvy would agree, and that we pay  
22 the filing fee. This is where we had the  
23 agreement, I believe, and then things changed  
24 overnight, a figure of speech.

25 I would have had to have

1 "Hello, I hope to get  
2 something mid-morning. I  
3 apologize for the delay  
4 in this. Patrick."  
5 "Thank you, Patrick." (As  
6 read)

7 Friday, October 10 did he send  
8 that e-mail? Regardless of when he said it, I  
9 thanked him for letting me know he would get me  
10 something Monday on Friday late in the afternoon.  
11 533 Q. So at some point, between  
12 Friday and late in the afternoon, and Tuesday at  
13 1:29, he provided you with the "Hello, Mr. Logan"  
14 e-mail?

15 A. Yes, and that's what I'm  
16 looking at right now. He didn't answer the  
17 question, did he? No, so it probably happened  
18 after 1:29 on Tuesday, October 16, because the  
19 whole question came down to: How long does it  
20 take? He doesn't answer it in that e-mail thread.

21 534 Q. Okay.

22 A. So did we have a phone  
23 call? I'm presuming we did. Would I have taken  
24 notes, yes.

25 535 Q. And you're going to

1 sought permission to make the statement on  
2 October 11. No court costs or filing fees. I  
3 mean, I can't make that decision, right, I'd have  
4 to get permission for that one.

5 MR. MCHAFFIE:

6 532 Q. Okay?

7 A. Am I right? So then  
8 Christian introduces Patrick to the equation. So  
9 we're still on October 11. We're now in the  
10 afternoon.

11 "Please advise Mr. Logan  
12 on the process involved  
13 in the general terms  
14 without providing any  
15 confidential  
16 information."

17 That's what I think I had  
18 spoke earlier about other ISPs, about commercial  
19 confidential information. So TekSavvy has  
20 commercial confidential information they don't  
21 want everybody else to know about.

22 "Well, Patrick, when may  
23 I expect to hear from  
24 you?"

25 Friday October 12.

1 produce those notes --

2 A. I'll produce my  
3 investigative notes --

4 536 Q. Identify when that --

5 A. Happened.

6 537 Q. -- happened?

7 U/A MR. ZIBARRAS: We'll do that.

8 MR. MCHAFFIE:

9 538 Q. Okay, if you can look at  
10 your paragraph 40?

11 A. Okay. Yes.

12 539 Q. The FAQs that were  
13 provided that you have quoted --

14 A. Yes.

15 540 Q. -- in paragraph 40 and  
16 attached at Exhibit W --

17 A. Yes, sir.

18 541 Q. -- provide information to  
19 TekSavvy customers specifically about the motion  
20 brought by Voltage? That's correct?

21 A. Excuse me. The question  
22 is, sorry?

23 542 Q. That the copyright  
24 FAQs --

25 A. Yes.

1 543 Q. -- pertain specifically  
 2 to the request brought by Voltage, the motion  
 3 brought by Voltage? If you look at, for example,  
 4 number 5:  
 5 "What is TekSavvy's role  
 6 when it receives notice  
 7 of a legal proceeding  
 8 such as this" --  
 9 A. Such as this, that would  
 10 indicate --  
 11 544 Q. -- "how will I know if  
 12 TekSavvy has received a  
 13 request for my personal  
 14 information?" (As read)  
 15 A. Point 5, "such as this"  
 16 would indicate the current case. I'm not aware of  
 17 TekSavvy being -- any other cases subsequent to or  
 18 prior to, with similar-type cases.  
 19 Point 15:  
 20 "How many customers are  
 21 affected by this?" (As  
 22 read)  
 23 And then documents posted on  
 24 the website. I don't know if the documents are  
 25 actually up at this point in time yet. I think it

1 550 Q. And Y, the exhibit, which  
 2 you quote in your paragraph 42, this press release  
 3 relates specifically to the motion from Voltage  
 4 Pictures, and provides information with respect to  
 5 that?  
 6 A. Sorry, what is the  
 7 question?  
 8 551 Q. This document relates  
 9 specifically to the Voltage Pictures motion --  
 10 A. Correct.  
 11 552 Q. -- and provides  
 12 information with respect to that?  
 13 A. Yes, I would agree that  
 14 that's what this does.  
 15 553 Q. Exhibit Z, again, this  
 16 provides information --  
 17 A. It provides information.  
 18 It has a lot of impact. It's marketing material,  
 19 as far as I'm concerned.  
 20 554 Q. It provides information  
 21 --  
 22 A. Yes.  
 23 555 Q. -- to those who read it  
 24 with respect to the TekSavvy -- sorry, the Voltage  
 25 motion in particular?

1 was -- the copyright section went up first, then  
 2 the documents, and then the documents are  
 3 regularly posted, and then the link started to  
 4 appear to CIPPIC and to -- did it go to Stikeman  
 5 Elliott? I don't think so.  
 6 545 Q. But just to get back to  
 7 it, so this is very much directly in the context  
 8 of the Voltage motion?  
 9 A. Voltage Pictures.  
 10 546 Q. Yes.  
 11 A. That would be my opinion,  
 12 and, yes, I would say that they would be answering  
 13 the many curious e-mails that they would be  
 14 getting.  
 15 547 Q. And that's a fair thing  
 16 for an ISP to do?  
 17 A. Yeah.  
 18 548 Q. And, similarly then, at  
 19 Exhibit X, the legal documents for request for  
 20 customer information relate specifically --  
 21 A. Yup.  
 22 549 Q. -- to the motion brought  
 23 by Voltage, and providing information with respect  
 24 to it?  
 25 A. Yeah.

1 A. Yes, there's one in here  
 2 -- just let me slow down and go through these  
 3 point by point.  
 4 556 Q. No, actually --  
 5 A. Or you --  
 6 557 Q. What I'm doing is asking  
 7 you the questions that I look to in  
 8 cross-examination. This is not a freewheeling  
 9 "Let me take you through these."  
 10 A. Okay.  
 11 558 Q. Otherwise, we could well  
 12 be here for a very, very long time.  
 13 A. Well, that's okay. It's  
 14 the traffic now, that's of no concern to me, so we  
 15 can sit here until eight o'clock tonight.  
 16 559 Q. So then in --  
 17 A. So point 5 was the first  
 18 one that you pointed out to me?  
 19 560 Q. Sorry, no, what I'm  
 20 asking you now is about Exhibit Z.  
 21 A. Well, we were on W.  
 22 561 Q. All right. I asked you  
 23 the question that I had about W and you answered.  
 24 A. Did I? What did I say?  
 25 562 Q. Yes, it relates to

1 Voltage --  
 2 A. Is that the question  
 3 simply?  
 4 563 Q. Yes.  
 5 A. Okay. And then we were  
 6 at X.  
 7 564 Q. I asked the same question  
 8 about X, I asked the same question about Y.  
 9 A. Okay, let me slow down  
 10 here. I want to see what these documents are  
 11 actually saying. Yes, definitely X -- is that X?  
 12 X does, I mean, notices from Voltage, that's got  
 13 to be about Voltage Pictures.  
 14 Y? What was the next one?  
 15 The press release, the alleged copyright  
 16 infringement press release, okay, from Tina  
 17 Furlan.  
 18 565 Q. That relates specifically  
 19 to the Voltage Pictures motion, and provides  
 20 information with respect to it?  
 21 A. It has some TekSavvy  
 22 statements in it. I don't think it provides  
 23 information. It's subject to interpretation.  
 24 566 Q. Well, it advises whoever  
 25 reads it that TekSavvy Solutions has received a

1 with that, I think TekSavvy was all over the  
 2 national news about this stuff.  
 3 570 Q. So you'll agree then, in  
 4 terms of the question, that this is specifically  
 5 about Voltage Pictures' motion?  
 6 A. About TekSavvy and  
 7 Voltage.  
 8 571 Q. Yes?  
 9 A. Correct.  
 10 572 Q. Okay, good. So can we  
 11 move forward to Z? And, again, this relates  
 12 specifically to Voltage --  
 13 A. The news releases, yeah.  
 14 573 Q. Yes. And it provides  
 15 information with respect to the adjournment?  
 16 A. Mm-hmm. So what we have  
 17 here is a pattern of marketing press releases from  
 18 the director of marketing saying to everybody  
 19 step-by-step what's gone on along the way, saying,  
 20 "Okay" -- because these types of court cases are  
 21 quite infamous in Europe and the United States,  
 22 and there is a community of people or voices that  
 23 are anti-copyright enforcement, or anti-piracy  
 24 enforcement, and that the internet should be free  
 25 culture, and, you know, lots of other nice things

1 motion from Voltage Pictures.  
 2 A. Yup.  
 3 567 Q. It asks -- it advises  
 4 what court it's in, it asks what the information  
 5 that Voltage has asked the Court to order to  
 6 produce, it provides that information with respect  
 7 to it, and then it provides TekSavvy's position  
 8 with respect to the request. That's fair to say?  
 9 A. Mm-hmm.  
 10 568 Q. Yes?  
 11 A. Okay, this is the notice  
 12 agreement now, where we said okay. Reconciled the  
 13 addresses, because we knew that had to be done.  
 14 That was done pretty quick, the notices went out  
 15 to the customers that were affected, I remember  
 16 that.  
 17 569 Q. And, in fact, it  
 18 suggested that those who were affected might wish  
 19 to seek legal advice respecting rights? That was  
 20 a statement Mr. Gaudrault said to those who might  
 21 read this and might have been affected?  
 22 A. Yeah, let me stick with  
 23 that paragraph for a second. Okay, so this point  
 24 here there's no -- not received a court's order,  
 25 just a request and a motion. We made a big bang

1 like that.  
 2 There's a big voice to that,  
 3 just as much as there is a big voice that says,  
 4 "Hey, no, I've invested 5 million bucks in this,  
 5 or 25 million bucks, and I need to protect my  
 6 investment. If you're going to steal it from me,  
 7 I'm going to come to you and I'm going to recover  
 8 it from your -- from you."  
 9 So you have a clash of voices,  
 10 worldwide, loud. That's not opinion, I think  
 11 anybody is going to tell you that. So what  
 12 TekSavvy's marketing agenda is catering to here is  
 13 to the Canadian voice that's saying, "Hey, we're  
 14 going to standup for you folks because they're  
 15 making money off of piracy."  
 16 574 Q. If you read this press  
 17 release, it provides -- first paragraph provides  
 18 information regarding the adjournment?  
 19 A. Yup.  
 20 575 Q. Is that appropriate  
 21 information to disclose to people who may be of  
 22 interest to this case?  
 23 A. You know, sure.  
 24 576 Q. All right. The second  
 25 one sets out TekSavvy's view --

1 A. A press release or just  
 2 posted on the website as a link. We have  
 3 different views on that.  
 4 577 Q. Well, companies  
 5 communicate with --  
 6 A. Sure.  
 7 578 Q. -- their customers, their  
 8 potential customers, and the interested public via  
 9 their websites. Yes?  
 10 A. Mm-hmm.  
 11 579 Q. You've got to answer yes.  
 12 A. Yes, they do.  
 13 580 Q. Via press releases?  
 14 A. Yeah, they get into the  
 15 forums and they discuss it directly with them too,  
 16 and pose questions.  
 17 581 Q. So there are a number of  
 18 different ways in which they convey information?  
 19 A. There's lots of them,  
 20 going on TV shows is just another.  
 21 582 Q. If you can -- sorry, is  
 22 that directed at anybody in particular, or that's  
 23 just an example?  
 24 A. No, it's just an example.  
 25 583 Q. Okay. If you look --

1 attach ones and highlight for the Court ones that  
 2 were positive?  
 3 A. Yeah. Because I think  
 4 what the point here is is that all these positive  
 5 voices are clapping for TekSavvy for taking that  
 6 stand, that very first one that "We're not going  
 7 to allow this stuff to come up here to Canada."  
 8 In fact, I think I could probably produce records  
 9 from TekSavvy making those kinds of statements.  
 10 588 Q. And so the positive  
 11 voices are clapping, the negative voices are  
 12 booing?  
 13 A. The negative voices are  
 14 -- yeah, I mean, we were DDosed for four days in  
 15 the end of December.  
 16 589 Q. As was TekSavvy?  
 17 A. Well, it sucks for  
 18 TekSavvy because it sucked for us.  
 19 590 Q. Right. When you say --  
 20 exactly.  
 21 A. Communications are  
 22 interrupted.  
 23 591 Q. Right.  
 24 A. For them, their services  
 25 are interrupted.

1 okay, you talk -- and you've attached some -- a  
 2 blog post and threads, and some of them are  
 3 longer, and some of them are not, some -- you read  
 4 a fair number of threads, I think you said, with  
 5 respect to TekSavvy and Voltage?  
 6 A. Too much.  
 7 584 Q. All right. You quote  
 8 some of them here, in which people are supportive  
 9 of TekSavvy. That's fair to say?  
 10 A. Yeah, mm-hmm.  
 11 585 Q. And you will agree that  
 12 there were also a large number of voices that were  
 13 not supportive of TekSavvy?  
 14 A. Far less than the ones  
 15 that were because of the vocal nature of TekSavvy,  
 16 and being seen to do something about what the  
 17 anti-voice had labelled a "trolling activity", as  
 18 opposed to "improper enforcement" or "IP  
 19 protection regime", in which every rights holder  
 20 has the rights too, built in right into the law.  
 21 586 Q. Okay. So some of the  
 22 voices were positive, some of the voices were  
 23 negative?  
 24 A. Correct.  
 25 587 Q. Right. You only chose to

1 592 Q. Right.  
 2 A. Their hosted business  
 3 services are all disrupted.  
 4 593 Q. Right.  
 5 A. So the servers that my  
 6 site is sitting on, that server boxes other  
 7 neighbours.  
 8 594 Q. And that happened --  
 9 A. As a result of this. So  
 10 those anti-voices took Canipre off the air for a  
 11 couple of days. We had to hop ISPs.  
 12 595 Q. And attacked TekSavvy in  
 13 that same way?  
 14 A. I don't know. I haven't  
 15 -- the only knowledge I actually have of that is  
 16 Marc Gaudrault's statements. I haven't seen or  
 17 heard anything else about -- I'm not saying it's  
 18 true or not true. That's the only information I  
 19 have.  
 20 Well, I just want to address  
 21 your laughing partner, your client here. These  
 22 types of things are reported on so heavily,  
 23 frequently, and consistently, that you can't go  
 24 online without tripping over this stuff. And the  
 25 extent that we're online, we would be aware of it.

1 596 Q. I'm a little concerned  
 2 that aggressively pointing at my client, as you  
 3 try to make points, is not appropriate during the  
 4 course of a cross-examination. I'll ask you to  
 5 cool it.  
 6 MR. ZIBARRAS: I don't think  
 7 that was aggressive.  
 8 MR. MCHAFFIE:  
 9 597 Q. Well, it was definitely  
 10 pointing directly at Mr. Abramson as you tried to  
 11 make a point that was not responsive --  
 12 MR. ZIBARRAS: He was smiling,  
 13 which --  
 14 MR. MCHAFFIE: Sorry, I'm --  
 15 THE WITNESS: My apologies.  
 16 MR. MCHAFFIE:  
 17 598 Q. There we go. Let's just  
 18 leave it at that.  
 19 MR. ABRAMSON: In fairness, I  
 20 will cease to react when my colleague is accused  
 21 of lying in his affidavit.  
 22 MR. ZIBARRAS: Thank you.  
 23 MR. MCHAFFIE:  
 24 599 Q. Log retention policies,  
 25 and you were addressing paragraph 47.

1 year?  
 2 605 Q. Perhaps longer than they  
 3 needed to for business purposes?  
 4 A. Two years? And then we  
 5 show up, and all of a sudden, bang, let's change  
 6 it. Let's put it out to the community and see  
 7 what they say. If you read all the posts on that  
 8 particular topic, I think you'll find a lot of  
 9 people post comments that -- "That's great", "No,  
 10 no, get rid of it", you know, "30 days, that's  
 11 it." I mean, there's a lot of supporting voices  
 12 to lower the time period that TekSavvy was  
 13 pursuing for its retention policy. Now how long  
 14 PIPEDA has -- the impact for PIPEDA on his  
 15 recordkeeping, how long does he have to keep it,  
 16 you know, I already said I don't know, I didn't  
 17 consider it because I don't know.  
 18 606 Q. You don't know how long  
 19 they have to keep it for business purposes?  
 20 A. No, I do not.  
 21 607 Q. And you'll agree -- now  
 22 we're not seeking your legal opinion here, but  
 23 it's your understanding that informed your  
 24 paragraph 47, that generally businesses are  
 25 obliged to not keep it for any longer than they

1 A. Okay.  
 2 600 Q. Can you just take a quick  
 3 look at that and make sure you've got that?  
 4 A. Interesting statement.  
 5 Correct.  
 6 601 Q. Okay. You're aware that  
 7 ISPs are subject to the provisions of the PIPEDA?  
 8 A. Mm-hmm.  
 9 602 Q. Yes?  
 10 A. Yes.  
 11 603 Q. And did you consider the  
 12 obligations on an ISP under PIPEDA with respect to  
 13 the retention of information when you included  
 14 this statement in paragraph 47?  
 15 A. No.  
 16 604 Q. And when you talk about  
 17 Mr. Gaudrault in this post, and his intention  
 18 being to frustrate rights holders seeking the  
 19 identity of TekSavvy customers, on what basis are  
 20 you stating that intention and imputing it to  
 21 Mr. Gaudrault, as being intended to frustrate  
 22 rights holders?  
 23 A. How long did they retain  
 24 data before I knocked on their door? How long did  
 25 they retain data before I knocked on the door? A

1 need to for business purposes? That's fair to  
 2 say? Or do you know?  
 3 A. Sure, yes. So billing,  
 4 the billings, get the billing out, get rid of the  
 5 data. So what about police situations? How does  
 6 a company like TekSavvy handle that, when the  
 7 police come back six months after a pedophilia  
 8 case?  
 9 608 Q. That was not a question  
 10 that your counsel put to TekSavvy yesterday.  
 11 A. I'm sorry.  
 12 MR. ZIBARRAS: Good question  
 13 though.  
 14 THE WITNESS: Thank you,  
 15 James.  
 16 MR. MCHAFFIE: So those are  
 17 the questions I have. Thank you very much.  
 18 RE-EXAMINATION BY MR. ZIBARRAS:  
 19 609 Q. I have a couple of  
 20 follow-up questions, Mr. Logan. You were -- there  
 21 was some discussion that came up about VPN  
 22 services?  
 23 A. Yes.  
 24 610 Q. And you explained that  
 25 VPN services were used to hide one's IP address?

1 A. To hide their -- yeah,  
 2 their true identity. It's an obfuscation, to  
 3 hide, to mask their identity, to prevent their  
 4 identification, to preserve anonymity.  
 5 611 Q. All right. What -- in  
 6 regards to their goal, what is the effect of only  
 7 keeping logs for 30 days?  
 8 A. Jeez, by the time the  
 9 investigation is done, it's well past 30 days, let  
 10 alone the time an affidavit is created, the time  
 11 it would take me to get it to, say, Mr. McHaffie,  
 12 to go to court, to issue a claim, to serve on the  
 13 officers of a particular company, for them to then  
 14 go, "Well, we're well beyond that 30-day period at  
 15 that point in time."  
 16 612 Q. All right. You were  
 17 shown copies of -- we've marked as Exhibit A for  
 18 identification copies of Bell, Rogers, and other  
 19 websites that referenced the 700 megabyte size of  
 20 a movie?  
 21 A. Correct.  
 22 613 Q. Do any of those websites  
 23 offer a free 2:00 a.m. to 8:00 a.m. download?  
 24 A. I do not believe so, no.  
 25 614 Q. What do you understand or

1 content.  
 2 MR. ZIBARRAS: All right.  
 3 Those are my questions. Thank you.  
 4 MR. MCHAFFIE: Thank you.  
 5 Mr. Logan, thank you.  
 6 THE WITNESS: Thank you.  
 7 MR. MCHAFFIE: It has been a  
 8 long afternoon. I appreciate your time.  
 9 --- Whereupon the examination concluded at  
 10 4:06 p.m.  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

1 who do you understand take advantage of 2:00 a.m.  
 2 to 8:00 a.m. downloads, and why?  
 3 MR. MCHAFFIE: I will object  
 4 to that question.  
 5 The way things usually work on  
 6 a cross-examination, by the way, Mr. Logan, is  
 7 that I object to the question, you then provide  
 8 your response, subject to the objection and any  
 9 ruling it might have. I don't think it's anyway  
 10 proper, but. So you can provide your answer  
 11 subject to that --  
 12 THE WITNESS: So can you  
 13 repeat the question, please?  
 14 MR. ZIBARRAS:  
 15 615 Q. Who do you say takes  
 16 advantage of 2:00 a.m. to 8:00 a.m. downloads, and  
 17 why?  
 18 A. Heavy internet users.  
 19 Because there's -- I mean, bandwidth is faster,  
 20 there's no caps, no throttling, it's unlimited,  
 21 they can set a torrent scheduler, they can torrent  
 22 to their heart's content while they sleep.  
 23 But generally the answer -- to  
 24 answer the question "Who uses that", heavy  
 25 internet users who acquire content or download

**Rachel Williams**

---

**From:** Bram Abramson <babramson@teksavvy.ca>  
**Sent:** October-09-14 3:14 PM  
**To:** desk  
**Subject:** FW: [Fwd: Re: Your Enquiry re: TekSavvy]

Could you print for the Tokay Room?

-----Original Message-----

**From:** Barry Logan [mailto:blogan@canipre.com]  
**Sent:** Tuesday, October 16, 2012 1:29 PM  
**To:** Patrick Misur  
**Subject:** RE: [Fwd: Re: Your Enquiry re: TekSavvy]

EXHIBIT NO. 7  
EXAM OF BARRY LOGAN  
DATE OCT 9, 2014  
REPORTER \_\_\_\_\_  
ASAP REPORTING SERVICES INC.

Thanks Patrick,

I am working with a 60 day backdate of IP addresses, basically August 1 - October 8, 2012. We would provide you with a spreadsheet of the subject IP addresses with each address accompanied by a UTC generated stamp.

Can you clarify the following points for me:

- what is the retention period of data TekkSavvy holds
- is your reconciliation process manual, automated or a combination of manual and automated queries
- what is the turn around time for a single IP address search?
- what is your estimated turnaround time for a block of 100 IP addresses to subscriber account identifications

I look forward to your return,

Best,  
bjl

> Hello Mr. Logan,

>

> My apologies for the delay.

> We offer internet services based on 2 different technologies, cable

> and DSL. Each has their own method of assigning IP address allocation.

>

> On the DSL network, TekSavvy is responsible for assigning the IP

> addresses which tie to a PPPoE login account. We log the session

> login and logout times related to the PPPoE login and what IP the

> customer was given and hold these for a limited amount of time. This

> is all performed using a protocol called RADIUS

>

> On the cable network, we provide blocks of IP addresses to the

> underlying cable operator who allocates those IPs based off a

> geographic location in their DHCP servers. We do not have direct

> control over these nor do we have access to lookup the IP address to

> modem MAC address logs. We would have to redirect you to the

> underlying cable operator to get those details.

>  
> If you could provide the IP addresses in question, we would be able to  
> determine which scenario from the above they fall in. If you also  
> have the date of the record, we could tell you if our logs go back  
> that far into the past.  
>  
> PATRICK MISUR  
> IT MANAGER  
> TekSavvy Solutions Inc  
>  
> TEL 519-360-4742  
> TOLL FREE 1-877-779-1575 FAX 519-360-1716  
>  
> 800 Richmond Street, Chatham, ON, N7M 5J5 www.teksavvy.com  
>  
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>  
> -----Original Message-----  
> From: Barry Logan [mailto:blogan@canipre.com]  
> Sent: Friday, October 12, 2012 4:12 PM  
> To: Patrick Misur  
> Subject: RE: [Fwd: Re: Your Enquiry re: TekSavvy]  
>  
> Thank-You Patrick.  
> bjl  
>  
>  
>  
>> Hello,  
>>  
>> I hope to get you something mid Monday morning.  
>> Apologies for the delay in this.  
>>  
>> PATRICK MISUR  
>> IT MANAGER  
>> TekSavvy Solutions Inc  
>>  
>> TEL 519-360-4742  
>> TOLL FREE 1-877-779-1575 FAX 519-360-1716  
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>> 800 Richmond Street, Chatham, ON, N7M 5J5 www.teksavvy.com

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>>  
 >> Thank you for thinking about the environment before printing this  
 >> e-mail. ¯\\_(ツ)\_/¯

>>  
 >>  
 >> -----Original Message-----  
 >> From: Barry Logan [mailto:blogan@canipre.com]  
 >> Sent: Friday, October 12, 2012 3:04 PM  
 >> To: Patrick Misur  
 >> Subject: [Fwd: Re: Your Enquiry re: TekSavvy]

>>  
 >> Hello Patrick,  
 >>  
 >> When may I expect to hear from you?  
 >> bjl

>>  
 >> ----- Original Message  
 >> -----  
 >> Subject: Re: Your Enquiry re: TekSavvy  
 >> From: "Christian Tacit" <ctacit@tacitlaw.com>  
 >> Date: Thu, October 11, 2012 2:13 pm  
 >> To: "Patrick Misur" <pmisur@teksavvy.ca>  
 >> Cc: blogan@canipre.com  
 >> "Pascal Tellier" <ptellier@teksavvy.ca>

>> -----  
 >> -  
 >> ----  
 >>  
 >> Pat,  
 >>  
 >> Please advise Mr. Logan on the processes involved in general terms  
 >> without providing any confidential information.

>>  
 >> Thanks.

>>  
 >> Chris

>>  
 >>  
 >> Christian S. Tacit,  
 >> Barrister & Solicitor  
 >>  
 >> P.O. Box 24210 RPO Hazeldean

>> Kanata, Ontario  
>> K2M 2C3 Canada  
>>  
>> Tel: +1 613 599 5345  
>> Fax: +1 613 248 5175  
>> E-mail: ctacit@tacitlaw.com  
>>

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>> destroy or delete copies you may have received.

>> On 11/10/2012 2:09 PM, Barry Logan wrote:

>>> Dear Christian,

>>>

>>> No court costs or filing fees will be sought if the application is  
>>> on consent. If TekSavvy chooses to oppose the application, then it  
>>> will of course have to retain counsel and pay any costs awards that  
>>> may be associated with opposing the Application and losing. In our  
>>> experience, however, these Applications are always on consent and  
>>> present no cost consequences whatsoever for the ISP providers. We  
>>> can imagine no reason why it would be any different with TekSavvy.  
>>> Also, no order will be sought against TekSavvy for answers it cannot  
>>> provide.

>>>

>>> I trust this helpful and do look forward to your return, bjl

>>>

>>>

>>>

>>>

>>>> Mr. Logan,

>>>>

>>>> If the application is directed against TekSavvy, we will need  
>>>> assurance that no court costs will be sought from TekSavvy and that  
>>>> the filing fee for TekSavvy's Notice of Appearance will be paid by  
>>>> your client.

>>>> Assuming that to be the case, that the basis of the Application is  
>>>> fraud prevention/detection and that no order will be sought against  
>>>> TekSavvy for items that it cannot actually provide, TekSavvy would  
>>>> be able to assist. Can you confirm that this is acceptable to your  
>>>> client before we proceed?

>>>>

>>>> Chris

>>>>

>>>>

>>>> Christian S. Tacit,  
>>>> Barrister & Solicitor  
>>>>

>>>> P.O. Box 24210 RPO Hazeldean

>>>> Kanata, Ontario

>>>> K2M 2C3 Canada

>>>>

>>>> Tel: +1 613 599 5345

>>>> Fax: +1 613 248 5175

>>>> E-mail: ctacit@tacitlaw.com

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>>>> sender and destroy or delete copies you may have received.

>>>> On 11/10/2012 11:48 AM, Barry Logan wrote:

>>>>> Dear Chris,

>>>>>

>>>>> My firm is a provider of digital evidence arising from 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.

>>>>>

>>>>> We would provide the subject IP address coupled with a date/time  
>>>>> UTC stamp and would then require the subscriber account be  
>>>>> identified from the provided IP address. It is a technical  
>>>>> process for TekSavvy to trace the lease, dhcp and arp to  
>>>>> determine which user account had been assigned the subject IP  
>>>>> address at a given point in time.

>>>>>

>>>>> I wish to walk through the process employed by TekSavvy to  
>>>>> determine how this company will arrive at the results of their  
>>>>> research.

>>>>>

>>>>> I hope this helps,

>>>>> bjl

>>>>>

>>>>>

>>>>>> Mr. Logan,

>>>>>>

>>>>>> Before we can advise on the process and TekSavvy's position on if  
>>>>>> or how to assist you, we need to understand why the request is  
>>>>>> being made and what information is being sought. Please advise.

>>>>>>

>>>>>>> Chris

>>>>>>>

>>>>>>>

>>>>>>> Christian S. Tacit,

>>>>>>> Barrister & Solicitor

>>>>>>>

>>>>> P.O. Box 24210 RPO Hazeldean

>>>>> Kanata, Ontario

>>>>> K2M 2C3 Canada

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>>>>> received.

>>>>> On 11/10/2012 11:20 AM, Barry Logan wrote:

>>>>> Good Morning Christian,

>>>>>

>>>>> We will be seeking the disclosure of account subscriber  
>>>>> information however, I would like some form of understanding how  
>>>>> it is that TekSavvy will determine the information from a  
>>>>> technical view point. This will provide me a further  
>>>>> understanding of the amount of resources that you have available  
>>>>> to fulfill the Order we are seeking.

>>>>>

>>>>> That is the purpose of my inquiry; can you discuss this with me  
>>>>> or direct me to someone at TekSavvy that is able to walk me  
>>>>> through the process you employ?

>>>>>

>>>>> With Thanks In Advance,

>>>>> bjl

>>>>>

>>>>>

>>>>>> Mr. Logan,

>>>>>>

>>>>>> I am counsel to Teksavvy.

>>>>>>

>>>>>> Kindly advise me of the account information that you are  
>>>>>> seeking and the reason for the request and then I will be able  
>>>>>> to respond to you regarding how we can proceed.

>>>>>>

>>>>>> Thank you.

>>>>>>

>>>>>> Sincerely,

>>>>>> --

>>>>>>

>>>>>>

>>>>>> Christian S. Tacit,

>>>>>> Barrister & Solicitor

>>>>>>>  
>>>>>>> P.O. Box 24210 RPO Hazeldean  
>>>>>>> Kanata, Ontario  
>>>>>>> K2M 2C3 Canada  
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>>>>>>>  
>>>>>>> -----

>>>>>>> Barry Logan  
>>>>>>> Sr. Director: Operations  
>>>>>>>  
>>>>>>> T. (519) 465-2656  
>>>>>>> E. blogan@canipre.com  
>>>>>>> -----

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>>>>>>>  
>>>>>>> -----

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>>>> -----

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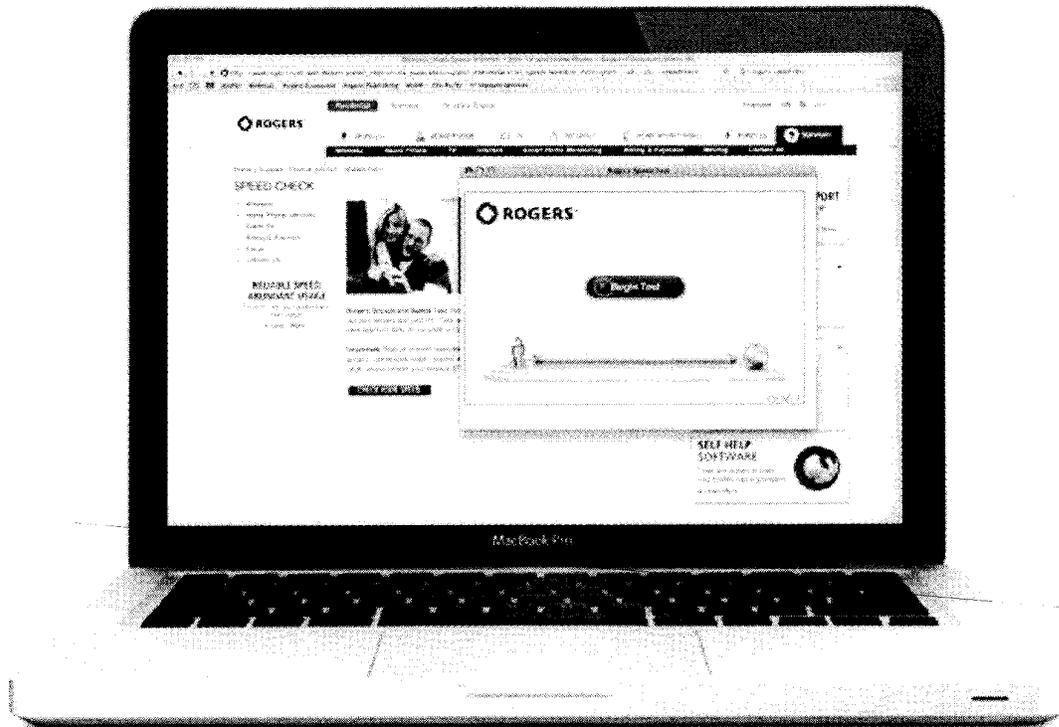
## Quick Tips

### How-To: Find Out How Fast Your Internet Connection Is

Use Rogers Speed Check to test it out

July 1, 2013 by Andy Davidson

EXHIBIT NO. A  
 EXAM OF BARRY LOGAN  
 DATE OCT 9, 2014  
 REPORTER \_\_\_\_\_  
 ASAP REPORTING SERVICES INC.



Rogers Hi-Speed Internet (<http://www.rogers.com/web/content/internet-superiority>) offers a variety of speeds and usage levels to meet every home-internet need. Here's how to find out just how fast your current internet-connection speed is:

1. Open your preferred Web browser and go to **Rogers Speed Check** (<http://rogers.com/speedcheck>).
2. Click **Check Your Speed** and then **Begin Test** in the new window that will be opened.
3. Watch while Rogers Speed Check measures your download and upload speeds.

### Jargon Buster

**Upload:** This is how fast your internet connection allows you send files to other computers or online resources. Measured in Kbps (or Mbps on faster connections), higher is better.

**Download:** This is how fast your internet connection allows you to receive files. Measured in Mbps (or Kbps on slower connections), higher is better.

**Mbps:** Stands for megabits per second. A megabit is a measure of data speed, not to be confused with a megabyte which is a measure of data storage. There are eight megabits in a megabyte. In other words, divide the speed in megabits per second (Mbps) by eight to get the megabytes per second (MB/s).

### The Plans

[Rogers Hi-Speed Internet \(http://www.rogers.com/web/content/internet-superiority\)](http://www.rogers.com/web/content/internet-superiority) packages range in speed from 6 Mbps download and 256 Kbps upload with Rogers Lite Internet, to 250 Mbps download and 250 Mbps upload on Ultimate Fibre Internet. That translates to 31.25 MB/s. In other words, you can download 100 MB of data in a little over 3 seconds. You can download 1 GB (1024 MB) in 32 seconds.

### **How fast is 250 Mbps?**

Song download (5 MB) – Less than a second

Movie trailer (60 MB) – Less than 2 seconds

Full-length movie (700 MB) – Less than 23 seconds

HD movie (4 GB) – 2 minutes, 11 seconds

### **How fast is 6 Mbps?**

Song download (5 MB) – 7 seconds

Movie trailer (60 MB) – 1 minute, 20 seconds

Full-length movie (700 MB) – 16 minutes

## **Popular Tags**

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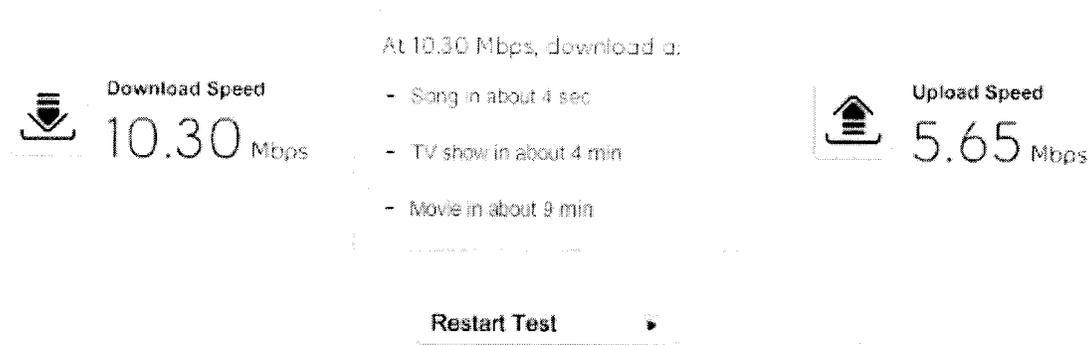
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**More from Rogers**

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This test measures the speed of the Internet connection between the PC you are currently using, and the Bell server.



OOKLA

Note: Based on the following file sizes: 5MB song, 300MB TV show, and 700MB movie.

The test results represent the maximum throughput capability of your connection when at least the recommended computer configuration is used.

### Factors affecting your Internet speed

When reviewing your speed results, please be sure to specifically consider your PC capabilities, whether you have up to date anti-virus software, whether your PC meets [minimum system requirements](#) and whether you have you powered off/on your DSL modem recently. Your speed result will depend on a number of factors, including technical configuration, Internet traffic, server and the “up to” speed of the Bell Internet service to which you’ve subscribed. Bell does not guarantee that maximum service performance or “up to” speeds will be attained. [Learn more about how to optimize your home PC setup.](#)

### Explore our full range of Bell Internet services

- [Find out what new Bell Internet services are available for your home](#)

### Do you have a question about your speed?

[Contact us](#) to find out how to optimize your connection speed.

 Your region is set to AB. If this is incorrect, please [change your region](#). 



# Understanding Internet Usage

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---

## Overview

Monitoring Internet data usage ensures all customers are on a plan that is right for them, and can clearly understand how they are using their Internet service.

---

## What is Internet Usage?

Internet usage is the amount of internet data that you or your household consumes. Data is sent and received any time you view a webpage, send an email, download songs, or stream videos.

Each piece of data has a certain size, generally measured in megabytes (MB) and gigabytes (GB).

- 1 Megabyte = 1024 Kilobytes (KB)
- 1 Gigabyte = 1024 Megabytes (MB)
- 1 Terabyte (TB) = 1024 Gigabytes (GB)

So when you: (approximate averages)

- Visit a webpage = 1 MB
- Upload a picture = 2 MB
- Download a song = 5 MB
- Stream a video = 50 MB
- Download a movie = 700 MB
- Watch 1 hour Netflix HD = 3 GB

---

## What counts as data?

Anything transferred to and from your home network over the Internet counts towards your monthly data usage.

- Web browsing
- Downloading or uploading files
- Online gaming
- Sending and receiving email
- Internet-based phone services (e.g. Skype, FaceTime)
- Streaming music or video (e.g. YouTube, Songza)
- Streaming TV services (e.g. Netflix, Apple TV)
- Applications that run on Optik TV (TEDTalks, Tumblebooks, etc)
- Optik on the Go (Video on Demand, when viewed through a device other than your TV)

---

## What doesn't count as data?

Using your Optik TV service does not count as data.

- Optik TV (except applications that run on Optik TV such as Facebook, Tumblebooks, etc.).
- Video on Demand included with your TELUS TV services.

---

## Manage your data usage

Manage your data usage to ensure you are on an Internet plan that meets your family's needs.

1. [Log in - https://www.telus.com/youraccount/](https://www.telus.com/youraccount/) to your TELUS account to view your data usage.
2. Under Products & services, select View details/modify beside the service you want to view.
3. Select View usage.
4. Select the billing period from the drop down list, then select Go to view your monthly usage.

### Monthly Data Allowances

If your plan is:	Your monthly data usage allowance is:
TELUS Internet 100, Optik Internet 100	500 GB
TELUS Internet 50, Optik Internet 50, HS Internet 50	400 GB
TELUS Internet 25, Optik High Speed Turbo, High Speed Turbo 25	250 GB
TELUS Internet 15, Optik High Speed, High Speed Turbo	150 GB
TELUS Internet 6, High Speed, High Speed Enhanced, High Speed Extreme	100 GB
TELUS Internet 1, High Speed Lite	30 GB

### Additional Internet usage rates

For select customers in Prince George, BC and surrounding areas, additional charges will apply for usage over your Internet plan's monthly data allowance starting on your November 2014 bill.

Usage over your monthly allowance will incur additional charges based on the chart below. These charges are not cumulative – you will only incur one charge, based on your final additional usage for the month.

Additional Usage	Total Charge
0-50 GB	\$5

50-100 GB	\$15
100-150 GB	\$25
150-200 GB	\$35
200-250 GB	\$45
250-300 GB	\$55
300-350 GB	\$65
350 GB and above	\$75

**Example**

Monthly Rate Plan	Monthly usage allowance	Total Data Usage	Additional Usage	Additional Charges	Total Charge
\$55	150 GB	225 GB	75 GB	\$15	\$55 + \$15 = \$70
\$55	150 GB	525 GB	375 GB	\$75	\$55 + \$75 = \$130
\$60	250 GB	410 GB	160 GB	\$35	\$60 + \$35 = \$95

If you need more data, you may be able to upgrade your Internet plan. You can also subscribe to Unlimited Internet Usage on any of our Internet plans for \$15 a month with at least three TELUS services, or \$30 with one or two services.

## Q&A

Q

How will I know how much data I'm using?

A

Customers will be notified by email when they have reached 75% and 95% of their total data allowance, as well as when they exceeded it. To receive these important notifications, please ensure that you have a current email address on file with TELUS. Customers can also track their usage at any time throughout the month by logging into their online account at [telus.com/login](http://telus.com/login).

Q

Why is TELUS tracking my Internet data usage?

A

We want every customer to understand their Internet service, and to be able to track their own usage. By monitoring Internet data usage – and allowing you to track and view your own usage – we can ensure that all customers are on a plan that is right for them, and can clearly understand how they are using their Internet service.

In order to ensure customers are aware of their usage and of the options available to them, TELUS will track internet data usage daily, and provide monthly usage totals on all customer bills. Customers can also track their usage throughout the month by logging into their online account at [telus.com/login](http://telus.com/login). The Usage Tracker will provide and a running total of their usage to date for their current billing cycle.

Q

Why is TELUS trialing charges for use over the monthly data allowances?

A

It's fair that people pay for how much they use, as you would with any other service. Our goal is to offer customers a broad spectrum of plans that meet everyone's needs, and to get customers on the right plan for them.

Someone who uses their basic internet service for a bit of email, Skyping with the grandkids, and sharing photos shouldn't pay as much as someone who games and downloads hundreds of gigabytes of videos every month.

In the past year, Internet data use has doubled. Even with our current usage allowances – which are amongst the highest in Canada – the demand on our network is significant. To help us continue to invest in enhancing our Internet speed and

thresholds, and focus on providing the best experience for customers, we're trialing new charges for Internet usage with our customers in Prince George.

Was this helpful?

Your feedback helps us improve this content.

Yes - #

No - #

Still have questions? Get more help.



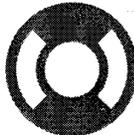
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- <http://community.telus.com/>



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Schedule a Learning Centre session -  
<https://telus.coconutcalendar.com/#step/1/0>

Get one-on-one support from a TELUS Expert and learn how to get the most out of your device.

[Book a session now - https://telus.coconutcalendar.com/#step/1/0](https://telus.coconutcalendar.com/#step/1/0)

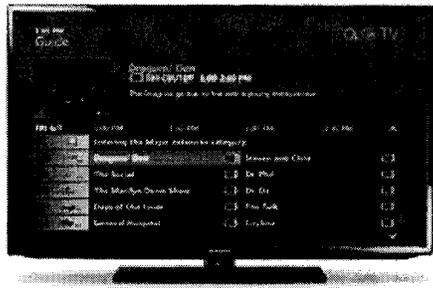
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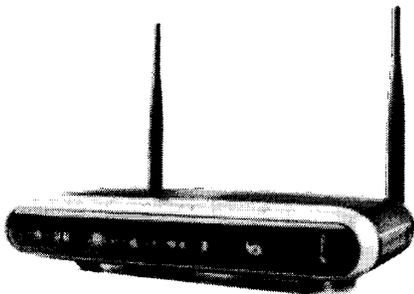
 Mobility



 TV



 Internet



 Home Phone



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INDEX

	PAGE
SWORN: STEVEN ROGERS	4
CROSS-EXAMINATION BY MR. MCHAFFIE	4
RE-EXAMINATION BY MR. ZIBARRAS	85

\*\*\*\*\*

LIST OF REFUSAL

Refusal (REF) found at page: 25

\*\*\*\*\*

LIST OF EXHIBITS

NO .	DESCRIPTION	PAGE
1	Copy of article by Professor Geist from Toronto Star website	41

\*\*\*\*\*

Page 4	Page 6
<p>1 Toronto, Ontario</p> <p>2 --- Upon commencing on Thursday, October 9, 2014</p> <p>3 at 10:28 a.m.</p> <p>4 SWORN: STEVEN ROGERS</p> <p>5 CROSS-EXAMINATION BY MR. MCHAFFIE:</p> <p>6 1 Q. Good morning, Mr. Rogers.</p> <p>7 A. Good morning, sir.</p> <p>8 2 Q. I see you have a copy of</p> <p>9 your affidavit in front of you, and I'll be</p> <p>10 focusing -- you won't be surprised to hear -- on</p> <p>11 the report that is attached at tab A behind that</p> <p>12 affidavit.</p> <p>13 And if I can ask you to please</p> <p>14 start at paragraph 5 of that report, I understand</p> <p>15 from that you've been involved in computer</p> <p>16 forensic examination and internet investigations</p> <p>17 since about 1995?</p> <p>18 A. Correct.</p> <p>19 3 Q. And from 1995 to 2002</p> <p>20 that was with the RCMP?</p> <p>21 A. Correct.</p> <p>22 4 Q. And subsequent to that,</p> <p>23 it was in the private sector?</p> <p>24 A. Correct.</p> <p>25 5 Q. So in looking at</p>	<p>1 9 Q. And when you talk about a</p> <p>2 mass lookup of the IP addresses, is that in a</p> <p>3 satellite context, or what sort of a mass lookup</p> <p>4 of IP addresses were you involved in?</p> <p>5 A. We have -- or I built a</p> <p>6 proprietary database that's used for managing the</p> <p>7 entire corporate infrastructure and police</p> <p>8 infrastructure of major investigations. And as</p> <p>9 part of what we collect, we store information that</p> <p>10 is both in a structured format and an unstructured</p> <p>11 format. The lookup that was asked of us was the</p> <p>12 supply of about -- I think it was about 2,000 IP</p> <p>13 addresses, to search our entire database, which at</p> <p>14 the time was probably around 400 million records,</p> <p>15 to identify as much information as we could on</p> <p>16 each IP address.</p> <p>17 10 Q. So the records in the</p> <p>18 database that you provided though, those were your</p> <p>19 own proprietary format that you had created?</p> <p>20 A. When you talk about</p> <p>21 proprietary format --</p> <p>22 11 Q. Sorry. You had said that</p> <p>23 this was a proprietary database that you had</p> <p>24 created?</p> <p>25 A. Yeah, it's a relational</p>
Page 5	Page 7
<p>1 paragraph 6, with respect to the RCMP, the</p> <p>2 analysis that you did, as I read that, had to do</p> <p>3 primarily with storage devices and operating</p> <p>4 systems?</p> <p>5 A. All kinds of</p> <p>6 applications, databases, anything that is stored</p> <p>7 on electromagnetic storage media.</p> <p>8 6 Q. So data recovery from</p> <p>9 storage media of various sorts?</p> <p>10 A. Well, it's not really</p> <p>11 data recovery, it's more data analysis.</p> <p>12 7 Q. And were you ever</p> <p>13 involved in a mass lookup of IP addresses, or</p> <p>14 correlation of IP addresses while you were at the</p> <p>15 RCMP?</p> <p>16 A. Not with the RCMP, but I</p> <p>17 was in the private sector.</p> <p>18 8 Q. In the private sector.</p> <p>19 And turning to that, paragraph 8 then, at H&amp;A</p> <p>20 Forensic and Investigative Accounting, is that</p> <p>21 where you were involved in a mass lookup of IP</p> <p>22 addresses, or that was later, when you were with</p> <p>23 your current firm, DEI?</p> <p>24 A. After I formed my own</p> <p>25 company.</p>	<p>1 database, so it has got many tables in it, there's</p> <p>2 many views, there's many stored procedures, it's</p> <p>3 -- you know, it's a large complex database.</p> <p>4 12 Q. And that took a while, I</p> <p>5 assume, to set up that database?</p> <p>6 A. That database, we've been</p> <p>7 -- yeah, we've been building that since about</p> <p>8 2004.</p> <p>9 13 Q. So over the course of ten</p> <p>10 years maybe, you've built that up?</p> <p>11 A. Yeah.</p> <p>12 14 Q. Okay. And that wasn't a</p> <p>13 process that you undertook for the purposes of</p> <p>14 this proceeding, you didn't try to import data</p> <p>15 from a RADIUS log file into that database and try</p> <p>16 to search it or anything like that?</p> <p>17 A. I've been -- since 1991</p> <p>18 I've been conducting major crime investigations</p> <p>19 that have required the identification, processing,</p> <p>20 analysis of large volumes of information. It</p> <p>21 included the creation of a database by myself in</p> <p>22 1994, where I was the first RCMP investigator to</p> <p>23 use imaging technology, and database technology,</p> <p>24 to manage a major crime investigation. That</p> <p>25 particular technology, I ended up taking to court,</p>

Page 8	Page 10
<p>1 and I was the first RCMP member to use database 2 and imaging technology as a demonstrative aid to 3 paper-paste evidence in a major crime 4 investigation and in a trial.</p>	<p>1 proprietary database that you set up, and the mass 2 IP lookup that you had done?</p>
<p>5 I ended up being part of the 6 national task force for the RCMP in 2000/2001, to 7 standardize how major crime databases were used in 8 the RCMP, and ended up writing the help manuals, 9 providing support and services to every major 10 crime unit in the RCMP in Canada, all based on the 11 database that I built.</p>	<p>3 A. Correct. 4 19 Q. And I asked you: That 5 mass IP lookup that you did, in your own 6 proprietary database, is not something you did for 7 the purposes of preparing this affidavit? 8 A. No.</p>
<p>12 In my private life, the 13 database that I built was initially constructed by 14 me for my own services that I provide to our 15 clients. And ultimately we provided it to some of 16 our clients for free, and now we actually 17 commercialize it and sell access to the database.</p>	<p>9 20 Q. That's -- 10 A. No, no, no.</p>
<p>18 In providing those services, 19 we -- and in conjunction with the computer 20 forensics -- I am regularly searching and managing 21 large volumes of database content.</p>	<p>11 21 Q. See, that's what I 12 thought the answer was, and instead I got a very 13 long answer regarding your experience in other 14 matters. 15 A. I'm sorry. I just wanted 16 to make sure that it was clear.</p>
<p>22 So notwithstanding, I have not 23 looked specifically at a RADIUS log file. The 24 RADIUS log file itself is nothing but a very 25 simple flat file that is essentially -- if not for</p>	<p>17 22 Q. So just for efficiency, 18 it's helpful to make sure that we're focusing on 19 the question that's put to you, if we can do that. 20 A. I just want to make sure 21 it's clear that I'm responding to the question 22 appropriately. 23 23 Q. When you talk in 24 paragraph 9 about your proprietary methodologies 25 of archiving internet content, is that what you</p>
Page 9	Page 11
<p>1 its size -- could be displayed in a spreadsheet 2 format. But because of its size, would need to be 3 imported to something like a SQL database, or some 4 other database that can handle the volume of 5 records.</p>	<p>1 were talking about, that database, or is that 2 something different?</p>
<p>6 15 Q. Thank you for that. Do 7 you recall what my question was?</p>	<p>3 A. That's part of it, it's a 4 multifaceted database, and one of the things it 5 does is we archive internet content for 6 evidentiary purposes. 7 24 Q. Sort of a little mini 8 Wayback Machine kind of thing?</p>
<p>8 A. You wanted to -- you 9 asked me if I have worked with RADIUS log files.</p>	<p>9 A. I wouldn't call it 10 "mini", but it's --</p>
<p>10 16 Q. No. I asked you whether 11 reviewing your database and looking up in your 12 database was something that you did for the 13 purposes of preparing this affidavit. It's fair 14 to say that you did not, that's not something you 15 did for the purposes of --</p>	<p>11 25 Q. Compared to the Wayback 12 Machine? 13 A. Yeah.</p>
<p>16 A. Just ask me again, I just 17 want to be clear that I understand what the 18 question was.</p>	<p>14 26 Q. But, again, that's not 15 something that you used for the purposes of 16 preparing your affidavit? 17 A. It wasn't required for 18 the purposes of what I was doing for this 19 affidavit.</p>
<p>19 17 Q. You've been telling me 20 about the proprietary database that you set up. 21 That's fair to say?</p>	<p>20 27 Q. You refer in your 21 paragraph 10 to Anton Piller orders that you had 22 been involved in. At least some of those related 23 to satellite signal issues? 24 A. Yes, they do.</p>
<p>22 A. I've been telling you 23 about my work with databases.</p>	<p>24 28 Q. All of them?</p>
<p>24 18 Q. No, but before my last 25 question, you'd been telling me about the</p>	

Page 12

1 A. Not all of them, no, but  
 2 many of them.  
 3 29 Q. The majority?  
 4 A. Yes, for sure.  
 5 30 Q. Okay. And did any of  
 6 them have to do with peer-to-peer file sharing?  
 7 A. No.  
 8 31 Q. You've not worked, as I  
 9 understand it, at an internet service provider?  
 10 A. I have not worked at an  
 11 internet service provider, but in 1996 I was  
 12 responsible for implementing and managing the  
 13 networks, to make available to our internal  
 14 clients in the RCMP, network resources, to enable  
 15 them to conduct major crime investigations using  
 16 the database that I built.  
 17 And post my RCMP life and my  
 18 private life, I have -- and in conjunction with  
 19 the database that we've built -- we provide  
 20 network resources to our clients in China, Hong  
 21 Kong, the U.K., Switzerland, all over the world.  
 22 So I'm intimately familiar with, you know,  
 23 providing network resources to clients.  
 24 32 Q. Okay. But you don't run  
 25 or work at an ISP?

Page 13

1 A. But I'm not an ISP. No,  
 2 and I said that.  
 3 33 Q. And between 1996 and  
 4 2012, the way an ISP might be run has changed  
 5 considerably? Or do you know one way or the  
 6 other?  
 7 A. An ISP provides network  
 8 resources, technology advances, things speed up,  
 9 hardware advances, but the underlying core  
 10 functionality or service of providing access to  
 11 the internet is still the same.  
 12 34 Q. And that's how you would  
 13 describe the service of an ISP, is providing  
 14 access to the internet?  
 15 A. Right.  
 16 35 Q. Regardless of what people  
 17 use that access for, they just provide the  
 18 service?  
 19 A. Right.  
 20 36 Q. Now you indicated that  
 21 you'd not worked with RADIUS log files. I take it  
 22 that means that you got no particular expertise in  
 23 the management, manipulation, or querying of data  
 24 from RADIUS log files?  
 25 A. As I've already said, I

Page 14

1 have significant experience with working with  
 2 databases. A RADIUS log file is not a complex  
 3 file, its simply a flat file that's comma  
 4 separated, and can be imported into a spreadsheet,  
 5 if not for its size. And because of its size,  
 6 would require importing into a more robust  
 7 database. But it's a very simple flat file.  
 8 37 Q. Have you ever done that,  
 9 imported a RADIUS file into something, into an SQL  
 10 Server?  
 11 A. I've managed, I've  
 12 managed many files, importing into databases and  
 13 analysing them, that are exactly the same as --  
 14 exactly the same structure as a RADIUS log file.  
 15 But with the exact same content, no.  
 16 38 Q. Okay. So to be clear --  
 17 and I always like to make sure that, again, the  
 18 question that I'm asking is being answered -- you  
 19 have never engaged in the task of importing a  
 20 RADIUS log file into a SQL Server? That's fair to  
 21 say?  
 22 A. Yes, but I want it to be  
 23 clear, that the RADIUS log file was not a complex  
 24 file, and I've managed and imported many files of  
 25 the same type, notwithstanding it was not output

Page 15

1 from a RADIUS log file.  
 2 39 Q. And talking about a  
 3 RADIUS log file having the same structure, do all  
 4 RADIUS log files have exactly the same structure?  
 5 A. They're configurable, so  
 6 no.  
 7 40 Q. And, similarly, do --  
 8 does every data point within a RADIUS log file  
 9 itself have the same structure necessarily? Or do  
 10 you know?  
 11 A. So what you're saying is  
 12 if I import a RADIUS log file from server A, and  
 13 the IP address ends up in column B, and import  
 14 from another server and the IP address ends up in  
 15 column C, then the data structure is different,  
 16 but the content is still the same.  
 17 41 Q. The content, for  
 18 example -- the content in a RADIUS log file will  
 19 come from a server in the ISP's network? That's  
 20 fair to say?  
 21 A. Yeah, that's fair to say.  
 22 42 Q. Or do you know? Is that  
 23 --  
 24 A. Yeah -- they're managing  
 25 that.

Page 16

1 43 Q. And the data that comes  
2 from the server to the RADIUS log file, the nature  
3 of the data, the content of the data, and the  
4 structure of the data, may depend on what it is  
5 that's being transferred by the router in any  
6 given circumstance, whether it's an upload,  
7 whether it's simply a timestamp, whether it's a  
8 download, whether it's IPv4, whether it's IPv6,  
9 the structure of the particular record that's  
10 being added to the log file may be different?

11 A. I don't think that  
12 question quite makes sense.

13 44 Q. Okay. Tell me where I  
14 went wrong. Let's try and do it one at a time.

15 A. While you're talking  
16 about load, and uploads, and downloads, the RADIUS  
17 log files are just used for authentication,  
18 authentication accounting.

19 45 Q. Okay. Do you know --

20 A. Authorization --

21 46 Q. -- what TekSavvy's  
22 servers upload to its RADIUS log files?

23 A. What they upload?

24 47 Q. Or "upload" is perhaps  
25 the wrong --

Page 17

1 A. Yeah, that doesn't make  
2 sense.

3 48 Q. -- the wrong word. The  
4 RADIUS -- well, maybe I'm using the wrong word.

5 A. If you're asking me --

6 49 Q. The RADIUS -- we agree  
7 that TekSavvy's servers, which are routers,  
8 transfer data to the log files?

9 A. They're servers, not  
10 routers.

11 50 Q. Or send data -- okay. Is  
12 it the routers? Routers send data to the RADIUS  
13 log file?

14 A. The network policy server  
15 sends data to the log file. The routers record  
16 the delivery of an IP address to a user.

17 51 Q. Okay. So what did we  
18 agree on? I thought we had understood that -- or  
19 do you know whether, in the case of TekSavvy, its  
20 routers send data to the RADIUS server? Do you  
21 know?

22 A. I don't believe it would.  
23 Their network policy server writes data to the log  
24 file.

25 52 Q. The nature of the data

Page 18

1 that's written to the RADIUS log file, do you know  
2 in the case of TekSavvy what that information is?

3 A. I haven't looked at  
4 TekSavvy's log files.

5 53 Q. Okay. And do you know  
6 whether every single record or piece of data  
7 that's written to the log file --

8 MR. ZIBARRAS: Why don't you  
9 show him what you're talking about, if you have --

10 MR. MCHAFFIE: No, I'm just  
11 asking what he knows and doesn't know in terms of  
12 giving his affidavit, right? And that's where I'm  
13 trying to find the lines between what he knows and  
14 what he doesn't know, and where we agree and where  
15 we disagree, which is, I think, what will be  
16 helpful to the Court.

17 MR. ZIBARRAS: But disagree  
18 with what? You don't have any evidence about any  
19 of this.

20 MR. MCHAFFIE: No, well, this  
21 is what I'm saying -- well, actually we have a  
22 fair amount of evidence from Mr. Gaudrault about  
23 -- and from Mr. Tellier -- about what is involved  
24 in doing so, and we got more yesterday. And what  
25 I'm asking, and trying to find out, is what this

Page 19

1 witness knows in terms of what he based his  
2 information on.

3 MR. ZIBARRAS: Okay.

4 MR. MCHAFFIE: And where we  
5 are going to agree, and where we are going to  
6 disagree.

7 MR. ZIBARRAS: But my concern  
8 is there's nothing to -- against which to agree or  
9 disagree. I mean, if you're asking him questions  
10 in a vacuum, right --

11 MR. MCHAFFIE: Well, I don't  
12 think he -- I mean, from what he said this  
13 morning, he certainly doesn't think he's acting in  
14 a vacuum with respect to his knowledge of RADIUS  
15 log files or SQL servers, or anything along those  
16 lines. If he doesn't know the answer, no doubt he  
17 can say that. If -- but that's what I'm trying to  
18 find out, what he knows and what he does not know.  
19 If the answer is, "No, it doesn't", then we'll be  
20 able to move on from there. If he does know, then  
21 we'll move on from there.

22 54 Q. So, for example, to get  
23 back to your point: Do you know whether TekSavvy  
24 has a network policy server?

25 A. I don't know TekSavvy's

1 infrastructure. What I know is that a RADIUS log  
2 file -- you know, regardless of how its getting  
3 written -- contains data that's stored in a flat  
4 format.  
5 55 Q. Nobody is -- I don't  
6 think that's a subject of dispute, so I'm just --  
7 you can go on if you like, but --  
8 A. Okay, then I don't  
9 understand, you know, your questions.  
10 MR. ZIBARRAS: I think we're  
11 trying to understand the relevance of your  
12 questions, because, in this case, the RADIUS log  
13 files are being -- have to be searched, right?  
14 That's what has to happen here. We don't have to  
15 understand where the RADIUS log file came from --  
16 MR. MCHAFFIE: No, we have to  
17 understand how difficult it is, or whether  
18 Mr. Rogers' statements regarding how easy it is to  
19 do so --  
20 MR. ZIBARRAS: All right,  
21 well, ask him --  
22 MR. MCHAFFIE: -- are fair in  
23 the current circumstances.  
24 MR. ZIBARRAS: Ask him about  
25 RADIUS log files.

1 MR. MCHAFFIE: No, I'm asking  
2 him -- I am. So I don't know -- I'm sorry, I'm  
3 not sure I appreciate the nature of these  
4 interruptions because my friend has been talking  
5 -- or Mr. Rogers has been talking about RADIUS log  
6 files, I'm asking questions about them, and you're  
7 now interrupting and suggesting that I ask him  
8 questions about RADIUS log files. So let's -- why  
9 don't you allow me to continue to do that, and  
10 we'll see where we get to.  
11 56 Q. The importation of a  
12 RADIUS log file into a SQL Server, how easy that  
13 is or complex will depend in part on the size of  
14 the RADIUS log file, and the structure of the data  
15 therein, and any differences within the RADIUS log  
16 file of the structure of different entries. Is  
17 that fair to say?  
18 A. No. From the evidence  
19 yesterday, it's my understanding that TekSavvy has  
20 three servers producing RADIUS log files.  
21 57 Q. In the Toronto area, and  
22 two elsewhere.  
23 A. Okay.  
24 58 Q. Three that relate to this  
25 proceeding.

1 A. Okay.  
2 59 Q. Yes, but --  
3 A. So if I understand your  
4 question correctly, you're saying that let's  
5 assume that the data structure of the RADIUS log  
6 files from each of those servers is different. Is  
7 that what you're asking?  
8 60 Q. No. Within -- let's back  
9 it up a bit. You also understood yesterday that  
10 there was a different RADIUS log file for each of  
11 those servers for each different day?  
12 MR. ZIBARRAS: A different log  
13 file created?  
14 MR. MCHAFFIE: Yes.  
15 MR. ZIBARRAS: And different  
16 log -- yeah.  
17 Is that -- what was your  
18 understanding? Is that --  
19 MR. MCHAFFIE:  
20 61 Q. Or do you have an  
21 understanding of that?  
22 A. Well, I don't understand  
23 your question, which is why I posed my responses  
24 in the way I do.  
25 62 Q. Okay. My question was:

1 Do you understand from yesterday, or at all, that  
2 at TekSavvy's operations, a different RADIUS log  
3 file is created for each RADIUS server for each  
4 different day?  
5 A. Correct.  
6 63 Q. Okay. So you understood  
7 that question, and that's --  
8 A. Yeah.  
9 64 Q. -- your answer? Okay.  
10 So do you know how many days we're talking about  
11 in the context of this proceeding?  
12 A. I believe 90 days.  
13 65 Q. In terms of the scope of  
14 the IP addresses and date stamps that were given  
15 by Voltage, do you know?  
16 A. If I understand, I think  
17 it's 90 days.  
18 66 Q. Okay. And if it was 60,  
19 you don't -- that's not something you would  
20 disagree with? Have you reviewed the list  
21 of names?  
22 A. No.  
23 67 Q. You've not reviewed the  
24 list of names. So if it were 60 days, then just  
25 to get our math right, we would be talking about

Page 24

1 180 log files from different -- from the three  
2 servers?  
3 A. Right.  
4 68 Q. Right. Okay, now to get  
5 back to the question I was trying to ask, within  
6 each RADIUS log file, there will be multiple,  
7 multiple, multiple records written to it?  
8 A. Right.  
9 69 Q. Millions?  
10 A. Yup. For sure.  
11 70 Q. Potentially? And it's  
12 possible, given the structure of a RADIUS network  
13 server, or a RADIUS server, a RADIUS log file, and  
14 the information that's coming in to it, that those  
15 records are not in a single uniform format.  
16 That's fair to say?  
17 MR. ZIBARRAS: What do you  
18 mean? Are you asking if it is --  
19 MR. MCHAFFIE: Yeah.  
20 Hypothetically.  
21 MR. ZIBARRAS: Hypothetically?  
22 MR. MCHAFFIE: Yes.  
23 MR. ZIBARRAS: But there's no  
24 evidence that they're not in the same format.  
25 Right?

Page 25

1 MR. MCHAFFIE: That's why I'm  
2 asking him hypothetically whether that can be the  
3 case. He's trying to second-guess -- his entire  
4 evidence is second-guessing the operations of  
5 TekSavvy, I'm asking him what the limitations are  
6 on that.  
7 MR. ZIBARRAS: Absolutely not,  
8 he's not second-guessing anything. He had -- he  
9 makes it very clear in his affidavit that he  
10 reviewed the affidavits that TekSavvy put into  
11 evidence, and based on that, he's giving evidence.  
12 All right. So that's the evidence.  
13 MR. MCHAFFIE: Mm-hmm. And  
14 I'm asking what might be the limitations on that  
15 evidence, and what might affect it.  
16 MR. ZIBARRAS: Well, if there  
17 were limitations, they should have been in your  
18 affidavits.  
19 MR. MCHAFFIE: No, I'm asking  
20 the limitations on his affidavit, not ours. And I  
21 don't want to get into big arguments with you. If  
22 you would like to refuse the question I just  
23 asked, you can refuse the question I just asked.  
24 REF MR. ZIBARRAS: Well, I don't  
25 think it's relevant because there's no evidence

Page 26

1 that can form the contextual basis for your  
2 question.  
3 MR. MCHAFFIE:  
4 71 Q. Have you ever engaged in  
5 the task of importing a flat text data file --  
6 sorry, I'll start that question again, just so  
7 we're on the same page. Have you ever engaged in  
8 the task of importing 180 flat text data files  
9 containing millions of records into a SQL server  
10 yourself?  
11 A. Not myself because I'm  
12 not a -- I'm not a SQL -- I have employees that do  
13 that for me.  
14 72 Q. Okay.  
15 A. I manage the operations.  
16 73 Q. And have you engaged in  
17 the task of querying a SQL server containing data  
18 from 180, leaving outside the RADIUS, flat text  
19 log files to correlate IP address information?  
20 Have you undertaken that task before?  
21 A. I have employees that  
22 have done that.  
23 74 Q. Okay. But you've not  
24 done that yourself?  
25 A. No.

Page 27

1 75 Q. And do you program SQL  
2 scripts, SQL scripts?  
3 A. I do not. I have  
4 employees who do that.  
5 76 Q. If you can turn up,  
6 please, paragraph 17 of your report. You have  
7 referred to Mr. Gaudrault's affidavit. And in  
8 paragraph 18 you say the statements that he makes  
9 are not completely accurate. So I just want to  
10 make sure that I know where we have agreement and  
11 where we have disagreement.  
12 Will you agree that an IP  
13 address is assigned to a device such as a  
14 computer, server, or printer that is connected to  
15 the internet?  
16 A. It doesn't have to be on  
17 the internet.  
18 77 Q. Okay. You'll agree that  
19 with respect to the IP address -- and this is what  
20 he's talking about, about private and public  
21 networks?  
22 A. Correct.  
23 78 Q. Okay. You'll agree with  
24 respect to the IP addresses that are at issue in  
25 this case, we're all talking about the public

1 sphere, we're not talking about the private  
2 network?

3 A. Correct.

4 79 Q. So that distinction  
5 between public and private isn't really an issue  
6 in this case. That's fair to say?

7 A. I was simply making the  
8 separation for the purposes of -- for clarity for  
9 the Court, trying to assist the Court.

10 80 Q. But what conclusions that  
11 the Court is going to draw about costs in this  
12 case, are you going to be affected by the  
13 public-private network distinction that you talk  
14 about?

15 A. I'm not drawing any  
16 conclusions on costs.

17 81 Q. Just to back it up, you  
18 know that you've given an affidavit in the context  
19 of attempting to assist the Court with respect to  
20 a claim for costs that TekSavvy has made?

21 A. Yes, but that's not what  
22 -- my role was to explain the -- to assist the  
23 Court with understanding the management of the  
24 importation of the RADIUS log files.

25 82 Q. And in paragraph 18, you

1 You agree with Mr. Gaudrault with respect to that?

2 A. No, because they can be.

3 86 Q. Okay. So they can be,  
4 but not invariably. So you would add the word  
5 "invariably"?

6 A. So what are you asking  
7 me?

8 87 Q. The reason that you --  
9 the reason that you disagree with Mr. Gaudrault  
10 here is that you would add the word "invariably",  
11 "IP addresses are not invariably assigned to a  
12 single device on a permanent basis, sometimes they  
13 are, sometimes they're not." Is that what you're  
14 saying?

15 A. I'm saying that sometimes  
16 they are and sometimes they are not.

17 88 Q. Okay. And, again, in  
18 terms of the issues and what TekSavvy was dealing  
19 with in terms of having to locate IP addresses,  
20 does that difference, that sometimes they are and  
21 sometimes they're not, matter to how long it would  
22 have taken to do, to correlate?

23 A. I don't believe so, they  
24 still have to confirm the IP's usage to a client  
25 or a customer.

1 talk about enabling the Court to draw conclusions,  
2 and that the inaccuracies might have a problem  
3 with that, where it might cause a problem with  
4 that, it may not be sufficient to enable that?  
5 That's fair to say?

6 A. I don't know what the  
7 Court needs, I'm simply trying to assist them.

8 83 Q. But the one thing we  
9 agree on is that the distinction between public  
10 and private networks, and public and private IP  
11 addresses, is not an issue in this case. That's  
12 fair to say?

13 A. No, I don't think it's an  
14 issue.

15 84 Q. I asked -- just to make  
16 sure, I asked: Is that fair to say? Yes, it's  
17 fair to say. No, it's not an issue. Right? I  
18 asked --

19 A. That's fair to say.

20 85 Q. That is fair to say.  
21 Okay, good. Sometimes the form of the question  
22 can make it uncertain. Mr. Gaudrault goes on to  
23 state -- and I'm reading from your paragraph 17 --  
24 he goes on to state that IP addresses are not  
25 assigned to a single device on a permanent basis.

1 89 Q. And, similarly, IP  
2 addresses are not assigned to a subscriber, but  
3 instead to a device; again, do you agree or  
4 disagree with that assertion?

5 A. Well, a subscriber  
6 receives the modem that TekSavvy provides.

7 90 Q. So your understanding is  
8 that TekSavvy provides its customers with modems?

9 A. They would provide them  
10 with a modem to connect to their network.

11 91 Q. On what basis do you base  
12 that? Have you looked, do you know whether  
13 TekSavvy does, or whether people provide their own  
14 modems?

15 A. Any ISP that I've ever  
16 used provides us with a modem.

17 92 Q. Have you used TekSavvy?

18 A. No, I have not used  
19 TekSavvy.

20 93 Q. So do you know whether  
21 TekSavvy provides its users with modems?

22 A. No, I don't know...

23 94 Q. And did you go on  
24 TekSavvy's website to even look at whether that  
25 was the case?

1 MR. ZIBARRAS: What's the  
2 case, whether they provide modems?  
3 MR. MCHAFFIE: Whether they  
4 provide modems.  
5 MR. ZIBARRAS: What difference  
6 does it make?  
7 THE WITNESS: Yeah.  
8 MR. MCHAFFIE: Well, he's made  
9 statements about modems in here, and says that --  
10 in paragraph 21 he talks about what an ISP will  
11 do.  
12 MR. ZIBARRAS: Right.  
13 MR. MCHAFFIE: And taking  
14 issue with Mr. Gaudrault, and I'm asking him  
15 whether that has any application to the case of  
16 TekSavvy, or whether he even knows. And it  
17 certainly seems to be the case that he does not  
18 know.  
19 MR. ZIBARRAS: He's telling  
20 you what he knows ISPs do.  
21 MR. MCHAFFIE: Right. He's  
22 now telling me, as I understand it, that this is  
23 what ISPs do, but he doesn't know whether that's  
24 the case with respect to TekSavvy.  
25 95 Q. That's fair to say?

1 A. I don't know how they  
2 would get a client -- a customer on the internet  
3 without buying them with a modem.  
4 96 Q. A customer can provide  
5 their own modems? Modems are available for sale.  
6 That's fair to say?  
7 A. But they still have a  
8 modem that connects to TekSavvy's network.  
9 97 Q. They have a modem, right.  
10 You're talking about TekSavvy providing them with  
11 a modem in your paragraph 21. Is that fair to  
12 say? You're talking about the ISP recovering  
13 their modem?  
14 A. If they supply it.  
15 98 Q. Right. But you're now --  
16 or you're prepared to admit that the ISP will not  
17 necessarily supply --  
18 A. The purpose of what I was  
19 trying to describe is that there's a modem that  
20 requires usage for connection to the network.  
21 99 Q. Right. That's all -- so  
22 what you're saying here is you need a modem to  
23 connect to the network?  
24 A. Right.  
25 100 Q. That's not an issue, I

1 don't think, in this case. Is anybody suggesting  
2 that you don't need a modem to connect to the  
3 internet?  
4 A. I don't know. I don't  
5 think so.  
6 101 Q. Okay. So in terms of --  
7 and why don't we just cut to the chase -- in terms  
8 of the information that you are saying, that you  
9 ascribe to Mr. Gaudrault in your paragraph 17, and  
10 that you then say are not completely accurate in  
11 paragraph 18, do any of them bear directly on the  
12 issue of how long it would take TekSavvy to  
13 conduct the IP address correlation exercise?  
14 A. I was simply responding  
15 to the content of Mr. Gaudrault's affidavit, and I  
16 felt that a little extra explanation may or may  
17 not be helpful to the Court. I didn't write the  
18 report for you or Mr. Gaudrault, I wrote the  
19 report to provide assistance to the Court. That  
20 the Court sees no value in it, then they can  
21 discard it.  
22 102 Q. What I'm trying to -- I'm  
23 trying to find out whether you think your comments  
24 bear on the issue that you know is at issue. Do  
25 any of these things that you are expressing a

1 difference of opinion, or inaccuracy, in your  
2 expert opinion, do they bear on the issue of how  
3 long it would take TekSavvy to undertake this  
4 exercise?  
5 A. Ultimately they have a  
6 log file that gets imported to a SQL database.  
7 They have a client, a customer service database,  
8 and they've got the Voltage spreadsheet, those are  
9 the three pieces of information that they need to  
10 work with.  
11 103 Q. So the answer is, no,  
12 none of them do. That's right?  
13 A. Right.  
14 104 Q. Now in terms of the IP  
15 address that I have when I access -- or that a  
16 user has when it access -- when he or she accesses  
17 the internet, if I want to know that at a  
18 particular point in time, like currently and I'm  
19 online, that's something that I can easily do by  
20 looking up "What's my IP address"?  
21 A. That's one way of doing  
22 it.  
23 105 Q. And that's, in fact, an  
24 instantaneous thing? If I go to -- and one of the  
25 websites you refer to as having visited is

1       whatsmyipaddress.com? If I go there, or if I even  
2       type in to Google "What is my IP address", I'll  
3       get that instantaneously?

4               A. Correct.

5       106       Q. An ISP, however, who  
6       might be on the other end of a telephone line, if  
7       the they type in "What is my IP address", they  
8       won't get the user's IP address, they'll get their  
9       own IP address?

10              A. Yes, that's what they  
11       would get.

12       107       Q. And so if they were  
13       looking to get the user's IP address, they would  
14       have to access data logs in some form or another,  
15       or they would simply ask the IP user to conduct  
16       that instantaneous Google search?

17              A. They would access their  
18       router or their log files.

19       108       Q. You can turn to  
20       paragraph 23, and this -- again, I don't know that  
21       this bears directly on the issue, but I do like to  
22       make sure that things are accurate. You say that:

23                        "In addressing the  
24                        request from the

25                        Plaintiff to supply

1                        of a civil proceeding,  
2                        nor has TekSavvy received  
3                        any subsequent requests  
4                        for such information by a  
5                        private party or in the  
6                        context of a civil  
7                        proceeding. Voltage's  
8                        request to TekSavvy was  
9                        therefore unique in  
10                      TekSavvy's experience, as  
11                      well as being unique in  
12                      Canada, to my  
13                      understanding, given the  
14                      number of IP addresses at  
15                      issue." (As read)

16                      So the question of it  
17                      originating from a private company and not law  
18                      enforcement made it unique to TekSavvy. That's  
19                      fair to say?

20                      A. If he says so.

21       110       Q. All right. And then the  
22       unique in Canada, he's not -- he's referring to  
23       the volume there, not the question that it comes  
24       from a private company and not law enforcement.  
25       That's a fairer reading of that statement?

1                      subscriber information  
2                      correlated to an IP  
3                      address, Mr. Gaudrault  
4                      describes it as unique in  
5                      Canada, since the request  
6                      originated from a private  
7                      company and not law  
8                      enforcement." (As read)

9                      That was your reading of  
10       Mr. Gaudrault's affidavit?

11              A. Yes.

12       109       Q. Okay. And you cite  
13       paragraph 10 in footnote 12 of that. If we turn  
14       up his paragraph 10, and if I -- you can either  
15       have your counsel put it in front of you -- what  
16       Mr. Gaudrault actually says is that:

17                      "Prior to the request by  
18                      Voltage and the order of  
19                      Prothonotary Aalto,  
20                      TekSavvy had never been  
21                      asked for, nor provided,  
22                      subscriber information  
23                      correlated to IP  
24                      addresses by a private  
25                      party, or in the context

1                      A. Yes, I have no idea if  
2                      other IPs have been asked for volume content. My  
3                      response was simply to say that as part of our  
4                      services that the law firms that we've worked with  
5                      have asked for IP to subscriber information.

6       111       Q. Right. I'm just trying  
7       to clear up what you say Mr. Gaudrault says, and  
8       make it clear that we've got no misunderstandings  
9       there.

10                      If you can turn to your -- and  
11                      just going on in paragraph 23, you talk about the  
12                      question of process in response to a request for  
13                      law enforcement compared to a request in response  
14                      to the search for 2,000 IP addresses. You were  
15                      here yesterday and heard evidence from  
16                      Mr. Gaudrault and Mr. Tellier regarding what the  
17                      process was when they received a request for a  
18                      single IP address from law enforcement?

19                      A. Correct.

20       112       Q. And that was a manual  
21       one-by-one search?

22                      A. Correct.

23       113       Q. And so that if their  
24       process is the same, if that manual process of 1.5  
25       to 2 hours were conducted, times 2,000, we'd be

1 talking about a very different type of an  
2 undertaking. That's fair to say?  
3 A. I would think so, yes.  
4 114 Q. And so your understanding  
5 is, in fact, that the processes were not the same?  
6 A. That's correct.  
7 115 Q. Okay.  
8 A. Based on the evidence  
9 from yesterday.  
10 116 Q. What you've learned  
11 since. Yes, what you've learned since. And  
12 that's fair. So you were dealing with -- when you  
13 wrote paragraph 23, the evidence that you had --  
14 now we have different evidence, and this -- if  
15 their process is this same, you recognize that  
16 that's not the case?  
17 A. That's correct, yeah.  
18 117 Q. So then when you look at  
19 paragraph 26 then of your affidavit, you refer to  
20 an article by Michael Geist, Professor Geist, and  
21 you gave the -- you gave the cite to it.  
22 I've got two copies there for  
23 you.  
24 MR. ZIBARRAS: Thank you.  
25 THE WITNESS: Thank you.

1 MR. MCHAFFIE:  
2 118 Q. I've put in front of you  
3 a copy of an article by Professor Geist from the  
4 Toronto Star website. That's the article you're  
5 referring to?  
6 A. I believe so, yes.  
7 MR. MCHAFFIE: Okay. We'll  
8 start perhaps by marking that as Exhibit A to this  
9 cross-examination. Actually, why don't we do  
10 Exhibit 1. I know that we often use letters for  
11 identification. Sorry to confuse. Exhibit 1.  
12 EXHIBIT NO. 1: Copy of  
13 article by Professor  
14 Geist from Toronto Star  
15 website  
16 MR. MCHAFFIE:  
17 119 Q. And if you look at the  
18 bottom of the first page, we talk -- that's the  
19 2011 document supplied to the Privacy Commissioner  
20 talking about the request for subscriber  
21 information?  
22 A. Correct.  
23 120 Q. And are you familiar with  
24 that document?  
25 A. No, I'm not.

1 121 Q. Okay. So in terms of  
2 what was being requested, whether it was -- and  
3 what it was based on, whether it was a request for  
4 subscriber information based on IP addresses,  
5 based on cellphone records, based on home phone  
6 records, or anything else, you don't know what --  
7 A. The article is about IP  
8 to subscriber information.  
9 122 Q. Well, if you read the  
10 first paragraph, it does say that:  
11 "Canadian internet and  
12 telecom providers have  
13 for many years disclosed  
14 basic subscriber  
15 information, including  
16 identifiers such as name,  
17 address, and IP address."  
18 (As read)  
19 So disclosing an IP address  
20 would not be necessary if that was something that  
21 was already in the possession of the requestor.  
22 That's fair to say?  
23 A. Yeah.  
24 123 Q. So -- but one way or the  
25 other, these are requests for information made to

1 telecommunication providers?  
2 A. Yes, that's what the  
3 article says.  
4 124 Q. And you don't know from  
5 either the article or from any knowledge of the  
6 2011 document, that what you are talking about is,  
7 in fact, requests for subscriber information based  
8 on IP addresses? You don't know that?  
9 A. Not if it's based solely  
10 on IP address, no.  
11 125 Q. And do you know who --  
12 A. But ultimately they're  
13 doing the same things, they're trying to match  
14 internet activity with a subscriber.  
15 126 Q. Telecommunications  
16 activity, to be clear. There's nothing that says  
17 we're only talking about internet activity here?  
18 A. Canadian internet and  
19 telecom providers.  
20 127 Q. Exactly,  
21 telecommunication providers include ISPs, but they  
22 also include cellphone companies, they include  
23 phone companies, and so forth?  
24 A. Yeah, for sure.  
25 128 Q. So this is not simply a

1 request to ISPs, and it's not simply a request for  
2 correlations for IP addresses. That's fair to  
3 say?  
4 A. No.  
5 129 Q. And you wouldn't want to  
6 leave the Court with that impression through your  
7 evidence?  
8 A. There's still -- the  
9 objective for law enforcement is to end up with a  
10 subscriber.  
11 130 Q. Right.  
12 A. So --  
13 131 Q. Or its telephone records,  
14 that would be a request from law enforcement to --  
15 A. Telephone records as  
16 in --  
17 132 Q. -- a telecom --  
18 A. As in --  
19 133 Q. Call history?  
20 A. I've never known telecom  
21 providers to supply --  
22 134 Q. Wireless call histories  
23 or wireless telephone numbers --  
24 A. I've never known them to  
25 provide that without a warrant.

1 135 Q. Now the other thing --  
2 A. Not in my experience.  
3 136 Q. Okay. And do you know  
4 who was providing this information, in terms of  
5 who the players were, the telecom and internet  
6 providers?  
7 A. I didn't --  
8 137 Q. Was it the Bell and  
9 Rogers of the world --  
10 A. I didn't write the  
11 article, I don't know.  
12 138 Q. Right. But you're giving  
13 evidence based on it, but you don't know who was  
14 providing that information?  
15 A. I'm simply identifying an  
16 article that appeared to provide some assistance  
17 to the Court, that the request to obtain  
18 subscriber information is not a unique request.  
19 139 Q. Well, what you're  
20 providing to the Court is a statement that says  
21 that your research indicates that requests to  
22 provide IP address to subscriber information  
23 correlation appears to be quite customary. That's  
24 the evidence that you've given to the Court based  
25 on this article. That's fair? That's your

1 paragraph 26.  
2 A. Well, my understanding of  
3 the article is that they're matching IP address to  
4 the subscriber, because if they already know the  
5 subscriber, they wouldn't be going to the ISP for  
6 -- or to the telecom provider to identify the  
7 subscriber.  
8 140 Q. At the very least, it's  
9 fair to say that there's nothing in this article  
10 that suggests that what is being talked about is  
11 either or, or is exclusively IP address to  
12 subscriber correlation information?  
13 A. Certainly not, certainly  
14 not exclusively.  
15 141 Q. Right. And in terms of  
16 the percentages, whether it's anywhere between 1  
17 and 99 percent, within those numbers, you simply  
18 have no way of knowing. That's fair to say?  
19 A. That's correct. That's  
20 fair to say.  
21 142 Q. And the other thing that  
22 the article does say --  
23 MR. ZIBARRAS: Well --  
24 MR. MCHAFFIE: Well, no, I  
25 don't need your evidence with respect to the

1 article. You can make your arguments.  
2 MR. ZIBARRAS: But you -- the  
3 article says what the article says, right? It  
4 says -- under the diagram -- they've been making  
5 more than a million requests annually to ISPs for  
6 basic subscriber information for years.  
7 MR. MCHAFFIE: Right. There's  
8 a caption under that that's written -- a caption  
9 to the thing that's not part of the article.  
10 That's fair to say? I'm not cross-examining you.  
11 I mean, you can make your arguments, but certainly  
12 the witness' evidence was that he was pretty clear  
13 on what my -- of what I've put to him was. But  
14 the article says that Canadian internet and  
15 telecom providers have.  
16 THE WITNESS: Again, I was  
17 simply trying to provide some information to  
18 assist the Court with the, you know, the scope of  
19 the request. Ultimately what I'm speaking to is  
20 the analysis of RADIUS log files, customer  
21 information, and a spreadsheet.  
22 MR. MCHAFFIE:  
23 143 Q. But in this case, in the  
24 process part, you're providing information to the  
25 Court about the customariness of such requests?

Page 48

1 A. Because it was brought up  
2 in Mr. Gaudrault's affidavit, so I was just trying  
3 to expand upon that a bit.  
4 144 Q. Okay. So that -- but  
5 that is the nature of the evidence that you were  
6 giving. And part of what Mr. Geist's article  
7 refers to, if you look at paragraph 2, is the  
8 statement:  
9 "Last month the Supreme  
10 Court of Canada struck a  
11 blow against warrantless  
12 disclosure of subscriber  
13 information, ruling that  
14 there is a reasonable  
15 expectation of privacy in  
16 that information, and  
17 that voluntary  
18 disclosures therefore  
19 amount to illegal  
20 searches." (As read)  
21 So part of the conclusion of  
22 the article is that those millions of requests,  
23 and providing them without a court order, are, in  
24 fact, illegal?  
25 A. I agree with that.

Page 50

1 obtain copies of those, either from Professor  
2 Geist's website, or otherwise, to review them?  
3 A. No, I didn't.  
4 150 Q. If you look at your  
5 paragraph 29, please, just so we're clear, this  
6 RADIUS definition that you've got at the beginning  
7 of paragraph 29, all the way up to the third last  
8 line where the footnote is, that's simply cut and  
9 paste from Wikipedia?  
10 A. That's correct.  
11 151 Q. And if you look at the  
12 last sentence:  
13 "The RADIUS logs are the  
14 output generated by the  
15 network policy server or  
16 internet authentication  
17 service." (As read)  
18 You'll agree that RADIUS logs  
19 can be generated by other systems such as  
20 FreeRADIUS?  
21 A. There's other methods to  
22 -- I'm not intimately aware of how the RADIUS logs  
23 are created.  
24 152 Q. Data can be added or a  
25 record can be added to a RADIUS log upon an event

Page 49

1 145 Q. In terms of the -- do you  
2 know anything about the process, that the people  
3 who provided -- let me back it up. This talks  
4 about the requests that were made rather than the  
5 information that was actually provided in response  
6 to those requests. That's fair to say?  
7 A. Yes.  
8 146 Q. Okay. And to the extent  
9 that information was, in fact, provided in  
10 response to the request, do you have any  
11 information regarding the process that was  
12 undertaken to provide that information in response  
13 to those requests?  
14 A. No, I don't.  
15 147 Q. Or what systems were in  
16 place at whatever those Canadian internet and  
17 telecom providers were to obtain that information?  
18 A. No, I don't.  
19 148 Q. Or how long it took to  
20 put those systems in place?  
21 A. No, I don't.  
22 149 Q. And in terms of the  
23 documents that mister -- that Professor Geist  
24 cites, the 2011 document, and the 2013 document  
25 from Public Safety Canada, did you attempt to

Page 51

1 such as a user logging on or logging off?  
2 A. Correct.  
3 153 Q. It can also be added on a  
4 serial basis at particular times to update on a  
5 regular basis?  
6 A. Incrementally based on  
7 the policy.  
8 154 Q. Whatever policy is in  
9 place, whether it's every 10 minutes, or every  
10 longer or shorter, the router or the device will  
11 be prompted to add to the log?  
12 A. Based on what I heard  
13 yesterday, I believe TekSavvy's was 15 minutes.  
14 155 Q. And that's -- data can be  
15 lost in that process. That's fair to say?  
16 A. I suppose data could be  
17 lost, yes.  
18 156 Q. And when there's the 10  
19 to 15-minute updates, 15-minute updates, that  
20 provides just a snapshot of who may be using at  
21 that particular time for the update?  
22 A. That's my understanding,  
23 yes.  
24 157 Q. Do you have any  
25 experience that would allow you to say whether

1 when reviewing a complete RADIUS log file you will  
2 necessarily, for example, see a logon associated  
3 with every logoff, a logoff associated with every  
4 logon, or an update for a particular IP address  
5 for every 15-minute interval during that period?  
6 Do you have any experience that can speak to that?

7 A. No.

8 158 Q. So then at paragraph --  
9 just back it up. What happens then? If you're  
10 engaged in the process of trying to identify or  
11 you correlate an IP address to a username at a  
12 particular timestamp, what happens if you don't  
13 have an associated logon or logoff, or if there  
14 are conflicts in the data? How do you deal with  
15 that?

16 A. If you don't have -- if  
17 there's no record there, that's -- that's like  
18 trying to prove a negative.

19 159 Q. You have to sort of try  
20 to --

21 A. If the record is not  
22 there, it's not there.

23 160 Q. You have to try and sort  
24 out what -- from the data that you do have --

25 A. You would expand --

1 that's every time it's updated, and ask it to  
2 filter for uniques based on the IP username match.

3 166 Q. So in paragraph 30 then,  
4 you set out your estimate of the time that you  
5 think ought to be spent on various steps in the  
6 process. And to start with, I guess -- these are  
7 your assessments, not having actually attempted to  
8 undertake a parallel request to see how long it  
9 took you, this is just based on your experience in  
10 other contexts?

11 MR. ZIBARRAS: Do you want him  
12 -- do you want to offer for him to go into your  
13 systems and search -- and start from scratch  
14 searching --

15 MR. MCHAFFIE: Sorry, are you  
16 objecting to the question that I have?

17 MR. ZIBARRAS: No, no, because  
18 you're asking him if he's done it, and obviously  
19 he hasn't, but if you're offering, we'll accept  
20 the offer.

21 MR. MCHAFFIE: What I'm doing  
22 is asking him a question, and what I'm not wanting  
23 is from you anything that's an argument, or  
24 anything like that.

25 MR. ZIBARRAS: I'm not

1 161 Q. -- your best information?

2 A. You would expand the  
3 scope of the particular entries for that IP before  
4 and after the one of relevance, and make an  
5 assessment.

6 162 Q. How would you determine  
7 the one of relevance? You've got a timestamp,  
8 you'll agree with me that the timestamp will not  
9 necessarily line up with exactly one of those  
10 15-minute updates?

11 A. Probably not.

12 163 Q. In fact, almost -- given  
13 how many seconds there are in 15 minutes --  
14 unlikely to?

15 A. Right.

16 164 Q. So you're limited to  
17 trying to put it between two --

18 A. Two 15 minutes --

19 165 Q. Other records that you  
20 might have, whether they're logon's, logoff,  
21 15-minute updates or anything else, that's the  
22 goal, is to try to figure that out?

23 A. You would -- once  
24 imported into SQL, you would conduct your search  
25 with a buffer of probably 15 minutes, because

1 arguing.

2 MR. MCHAFFIE: What I'm doing  
3 is asking him whether he has done this -- it  
4 doesn't need to be on our system -- has he done it  
5 on any system.

6 MR. ZIBARRAS: Well, but we  
7 could do it on your system, if you'll let us.

8 MR. MCHAFFIE: Mr. Zibarras,  
9 if you would like to make proposals to me, perhaps  
10 you could write me a letter. I've got a  
11 cross-examination being undertaken.

12 167 Q. I take it, Mr. Rogers,  
13 you never approached TekSavvy, you never asked  
14 Mr. Zibarras to approach TekSavvy to have access  
15 to their systems?

16 A. I was responding to  
17 Mr. Gaudrault's affidavit.

18 MR. MCHAFFIE: Right. Okay.  
19 So my question then -- and I'm not sure if you  
20 were -- are you objecting to it?

21 MR. ZIBARRAS: No, no, I'm  
22 just saying --

23 MR. MCHAFFIE: Okay.

24 168 Q. So my question is: That  
25 the evidence that you gave in paragraph 30 was not

1 based on having attempted to either undertake this  
 2 exercise, or a parallel exercise, but rather based  
 3 on your experience, that we've already gone into  
 4 to some degree. Is that fair to say?  
 5 A. It's based on my  
 6 experience and my research on RADIUS logs, and the  
 7 information we were provided in Mr. Gaudrault's  
 8 affidavit.  
 9 169 Q. So you haven't, for  
 10 example, attempted, in responding to this, to  
 11 re-create it, you've just sort of said, "This is  
 12 how I think it ought to have been done"? And  
 13 that's fair to say?  
 14 A. Correct.  
 15 170 Q. Again, that's in part  
 16 based on not knowing the structure of the data in  
 17 TekSavvy's logs?  
 18 A. The logs are -- the logs  
 19 are flat -- I don't need to know that the  
 20 structure, to extent of knowing which column a  
 21 particular value is going to be in, it's going to  
 22 be -- they're going to import into a  
 23 spreadsheet-like view, if that's what you're  
 24 asking.  
 25 171 Q. No, I was trying to get

1 created so that the system can read them.  
 2 177 Q. But you understood, or  
 3 you understand at least -- and I think we agree --  
 4 that there are different types of records that  
 5 might be in that log file, an upload -- sorry, a  
 6 logon record, a logoff record, or an update  
 7 record?  
 8 A. Each event would be  
 9 recording some certain information, so some fields  
 10 may be empty, and some fields may not be empty.  
 11 178 Q. And they might -- those  
 12 records might, in fact, have different numbers of  
 13 fields? You don't know?  
 14 A. That's not my  
 15 understanding of how logs work. The fields may be  
 16 empty, but it's going to log that the field  
 17 existed.  
 18 179 Q. If you look at paragraph  
 19 -- sorry, I guess -- yeah, if you look at  
 20 paragraph B, you indicate that the:  
 21 "Since TekSavvy had prior  
 22 experience with requests  
 23 of a similar nature, just  
 24 not the volume, the  
 25 previous processes that

1 back to the question of whether every record had a  
 2 common length, common delimitations, those sorts  
 3 of things, in terms of structure.  
 4 A. Fields of the same value  
 5 will have the same length.  
 6 172 Q. Right, but --  
 7 A. But that's what commas --  
 8 173 Q. -- each record may have a  
 9 different number of fields?  
 10 A. Yeah, but that's what the  
 11 comma is for, it tells you when the field breaks.  
 12 174 Q. When you're importing,  
 13 you need to know where one record begins and the  
 14 next one ends?  
 15 A. That's what the comma is  
 16 for.  
 17 175 Q. Will they always have the  
 18 same number of commas to end up with a total  
 19 number of fields for the same record? You don't  
 20 know?  
 21 A. That's my experience.  
 22 176 Q. But you don't know in the  
 23 case of TekSavvy?  
 24 A. With log files that's my  
 25 experience, the log files have to be consistently

1 must have been  
 2 implemented would need to  
 3 be adjusted to account  
 4 for the increase in  
 5 volume, but otherwise  
 6 should not have been  
 7 different." (As read)  
 8 Again, you understand now  
 9 that, in fact, the previous -- it wasn't just a  
 10 question of the previous process of being  
 11 adjusted, there was a different process put in  
 12 place?  
 13 A. Yes, there was a  
 14 different process.  
 15 180 Q. You also agree that in  
 16 data handling and manipulation and searching,  
 17 volume is an important factor?  
 18 A. It is if you're doing it  
 19 manually. In the context of a database, there's  
 20 not really a significant difference in the volume.  
 21 181 Q. The database will respond  
 22 equally and well whether it's got five records or  
 23 8 or 10 million records?  
 24 A. Yeah, we're talking  
 25 potentially milliseconds or seconds for a

Page 60

1 response, for a delta in the response.  
 2 182 Q. And to cut into that, for  
 3 example, have you -- you talk about IAS Log  
 4 Viewer, have you ever attempted to import a  
 5 million record file into IAS Log Viewer?  
 6 A. I've said in my affidavit  
 7 that I don't have any experience with it.  
 8 183 Q. Okay. So you have no  
 9 idea whether it would accept that, work well, or  
 10 anything like that in IAS Log Viewer?  
 11 A. No, I think I say in my  
 12 affidavit that it appears to be an alternative to  
 13 the SQL process, and that it has command line  
 14 tools that you wouldn't have to load it into the  
 15 viewer, you just search them raw.  
 16 184 Q. And do you know whether  
 17 you can load or open 180 different logs at the  
 18 same time in IAS Log Viewer, or merge them? Do  
 19 you know? You don't know?  
 20 A. I said that I have no  
 21 experience with IAS. If I was doing this I would  
 22 have done it in SQL as well.  
 23 185 Q. Okay.  
 24 A. I wouldn't have done it  
 25 with IAS.

Page 61

1 186 Q. So this -- just to cut  
 2 forward to paragraph D-3 -- the Defendant could  
 3 also have used an IAS Log Viewer, could have, but  
 4 you wouldn't have done it that way either?  
 5 A. Correct.  
 6 187 Q. Okay.  
 7 A. The IAS Log Viewer has  
 8 command line tools that would have offered an  
 9 alternative to the SQL process.  
 10 188 Q. But not a better  
 11 alternative?  
 12 A. Well, I've said that I  
 13 don't have any experience with it, so.  
 14 189 Q. What happens if you have  
 15 a -- if you're doing an import of a RADIUS log  
 16 file into a SQL, a database, and it fails to  
 17 import? Or there's -- it stops, or it doesn't all  
 18 import, it causes errors?  
 19 A. You assess what caused  
 20 the errors and correct it.  
 21 190 Q. And that can happen when  
 22 you're doing a large import?  
 23 MR. ZIBARRAS: Well, I don't  
 24 want you to speculate.  
 25 MR. MCHAFFIE: Okay.

Page 62

1 191 Q. Would that be speculation  
 2 if I asked you that question, or would that be a  
 3 fair hypothetical based on your experience?  
 4 A. I haven't experienced the  
 5 issue, but -- so I don't know.  
 6 192 Q. Can special characters in  
 7 a record cause import? Do you know?  
 8 A. Special characters can  
 9 sometimes cause processes to halt.  
 10 193 Q. And so if a process  
 11 halts, you've got to check it out to see what  
 12 happens?  
 13 A. To determine what the  
 14 issue was.  
 15 194 Q. It's a bit of an  
 16 iterative process, and hopefully you get to the  
 17 end after you've solved all your problems. Fair  
 18 to say?  
 19 A. Yeah.  
 20 195 Q. And when you're talking  
 21 about importing of people's personal data, I trust  
 22 that when you're involved in processes like this,  
 23 you take extra care to make sure that the personal  
 24 information that you're dealing with is treated  
 25 (a) carefully, and (b) accurately, so that you're

Page 63

1 getting the right results?  
 2 A. They're not importing  
 3 people's personal information in this task,  
 4 they're importing numbers and the username and  
 5 then matching it to...  
 6 196 Q. You're saying that the  
 7 correlation between the IP address -- in your view  
 8 -- the correlation between the IP address and a  
 9 username, and the time in which they were online,  
 10 and what they did at that time, is not personal  
 11 information, in your view?  
 12 A. It doesn't identify the  
 13 person without matching it to the customer  
 14 information.  
 15 197 Q. But you know that this  
 16 process is designed to do that matching. That's  
 17 fair to say?  
 18 A. What process?  
 19 198 Q. The process of  
 20 correlating IP addresses to subscriber  
 21 information.  
 22 A. That's the reason why  
 23 they're doing this, yes.  
 24 199 Q. Yes. And so, again,  
 25 because that's the outcome, you would want to make

1 sure that everything has been done well and  
2 properly, the import has been properly undertaken?

3 A. For sure, you got to make  
4 sure that you've got the data imported correctly.  
5 But if it's not going to import...

6 MR. ZIBARRAS: Should we take  
7 a break now?

8 MR. MCHAFFIE: Yeah,  
9 absolutely.

10 --- Break taken at 11:32 a.m.

11 --- Upon resuming at 11:39 a.m.

12 MR. MCHAFFIE:

13 200 Q. In paragraph C of your --  
14 sorry, at paragraph 30(c) on page 11, you talk  
15 about the issue of locating, transferring, and  
16 decompressing the RADIUS log files. And just for  
17 clarity, we're taking a step back in the process  
18 compared to what we were just talking about. This  
19 is a process that would be simply getting the  
20 RADIUS log files in their native form before  
21 import into the SQL Server. That's what we're  
22 talking about here?

23 A. Okay.

24 201 Q. Is that right? So we're  
25 on the same page?

1 A. Yes.

2 202 Q. And that's something that  
3 would have to be done -- if you've got a remote  
4 server -- that's something that has to be done  
5 over the wires. That's fair to say?

6 A. Yes.

7 203 Q. It's got to be  
8 downloaded, and -- I mean, I don't want to spend a  
9 lot of time on this, this is something you say  
10 ought to have taken one hour. If it took TekSavvy  
11 two hours, are you saying that two hours is  
12 unreasonable, but one hour is reasonable? Or are  
13 they both reasonable depending on the nature of  
14 the structure, and the systems you've got in  
15 place?

16 A. My estimates are human  
17 time, so I don't know how long it would take them  
18 to transfer. Now that I know that they store  
19 their backup files in data centres in Toronto, and  
20 they would logon to the data centre, identify the  
21 log files, and basically drag and drop them onto a  
22 local storage device, and wait for them to copy --  
23 but, for sure, it will take longer than an hour.  
24 But, but my estimate is human time, not machine  
25 time.

1 204 Q. But if you just drag and  
2 drop them all at the same time, you've got  
3 potential issues regarding the size of the pipes  
4 that you're using that might affect the ISP  
5 service that you're providing to your customers,  
6 for example. Is that fair to say? Or do you  
7 know?

8 A. I'm not sure what network  
9 they're on. But you don't have to identify them  
10 all at once. You could collect, you know, 50 of  
11 them.

12 205 Q. So there would be a  
13 manual --

14 A. Let them copy --

15 206 Q. There would be a manual  
16 process in there as you go through to do it? You  
17 could do it one at a time, you could do it three  
18 at a time, you could do it five at a time, you  
19 could do it more?

20 A. If you want to do it  
21 inefficiently and do them one at a time, then  
22 that's fine.

23 207 Q. If you do them one at a  
24 time, you would be able to make sure that each one  
25 came across the way you wanted it?

1 A. Well, there's nothing for  
2 you to make sure until you try to open the file.  
3 A human can't interpret whether the file has  
4 successfully transferred until they try to use it.

5 208 Q. One versus two hours, I'm  
6 not going to spend anymore time on that.

7 If you look at page 12, sub 3,  
8 just for clarity, you give a screenshot here of  
9 RADIUS logs in raw form, and you refer to the Deep  
10 Software website. So that's just a screenshot  
11 that you got from somewhere online?

12 A. Yeah.

13 209 Q. Now the one thing I  
14 noticed is that this is broken out into columns,  
15 right, into rows? The screenshot, you've got  
16 rows, it appears to be 1, 2, 3, 4 there?

17 A. Correct.

18 210 Q. Would a raw RADIUS log or  
19 a RADIUS log in raw form be broken out into rows,  
20 or would just be a series of text?

21 A. If you could make the log  
22 file wide enough, you'd be able to see it in rows.  
23 But in -- if you just open the file, it's just  
24 going to be a series of text.

25 211 Q. Okay. So in raw form,

Page 68

1 it's not broken down row to row to row, entry to  
 2 entry to entry, it's just a whole bunch of  
 3 consecutive --  
 4 A. Yes, that's correct,  
 5 until it gets imported into a database.  
 6 212 Q. So this has been imported  
 7 in some way into something rather than being a  
 8 picture of a RADIUS log in raw form?  
 9 A. No, this is just -- this  
 10 is a RADIUS log in raw form in a text viewer.  
 11 213 Q. Okay. But it -- okay.  
 12 So the 1, 2, 3, 4 isn't a broken -- it's not a  
 13 broken --  
 14 A. That's the lines by the  
 15 text viewer indicating --  
 16 214 Q. Those are just line  
 17 numbers, so they're not starting -- each one isn't  
 18 starting a separate record or entry here, they  
 19 just all happen to start with an IP address?  
 20 A. They'd be the starting of  
 21 each record, because the text viewer would  
 22 recognize the break between one record and the  
 23 next, and it's simply displaying it that way.  
 24 215 Q. How is the break between  
 25 one record and the next delineated in a RADIUS log

Page 69

1 file?  
 2 A. Usually by a carriage  
 3 return, to my knowledge.  
 4 216 Q. If you look at page 13,  
 5 30, paragraph D, first sub 1, you talk about  
 6 setting up the new SQL server, and you estimate  
 7 that it would take about five hours to build out.  
 8 And so if TekSavvy has put forward information  
 9 that indicates that it took five man-hours to  
 10 build out, you wouldn't think that unreasonable?  
 11 A. It seems to be a match to  
 12 me.  
 13 217 Q. And then when you look at  
 14 number 2, setting up programming and running an  
 15 import script, I think you -- I think you  
 16 confirmed to me that you don't -- that you don't  
 17 yourself program import scripts?  
 18 A. No, I don't.  
 19 218 Q. But you'll acknowledge  
 20 that in programming such an import script, there's  
 21 a debugging process, so that if a -- you start the  
 22 process, a problem arises, you have to fix it and  
 23 run it again until the next problem arises -- and  
 24 that's fairly standard?  
 25 A. Yes, again, I was basing

Page 70

1 my affidavit on the content of Mr. Gaudraul's  
 2 affidavit, and my recollection is that no such  
 3 problems were identified except for date issues  
 4 from Voltage. I could stand corrected, but I  
 5 don't believe there's any indication that there  
 6 was an import issue.  
 7 219 Q. But any import issue --  
 8 sorry, any import process of 240 gigs of data --  
 9 or describe it however you want, I think we talked  
 10 about millions of lines of data --  
 11 A. Millions of records.  
 12 220 Q. -- from 180 different  
 13 files, you're likely to come across something --  
 14 as something to address as a reasonable  
 15 expectation?  
 16 A. I have no idea if you --  
 17 you know, you're likely to run into that.  
 18 221 Q. Okay.  
 19 A. We manage large volumes  
 20 of data all the time and don't frequently run into  
 21 issues.  
 22 222 Q. And do all tools include  
 23 the ability to perform iterations of a script on  
 24 multiple files?  
 25 A. All tools?

Page 71

1 223 Q. Yeah, you talk about in  
 2 paragraph 2 that you would simply automatically  
 3 loop through all of the uncompressed RADIUS log  
 4 files unattended.  
 5 MR. ZIBARRAS: Do you  
 6 understand the question?  
 7 THE WITNESS: No.  
 8 MR. MCHAFFIE:  
 9 224 Q. So in your paragraph D,  
 10 sub 2, you suggest that what you can do is that  
 11 the script can automatically loop through all the  
 12 uncompressed RADIUS log files unattended, and  
 13 simply report when it's done?  
 14 A. Right, as it imports.  
 15 225 Q. Right. So you're saying  
 16 you just set it up, and it will import the first  
 17 one, then import the next one, then import the  
 18 next one, and so forth?  
 19 A. Right.  
 20 226 Q. Now so my question is:  
 21 Do all tools include the ability to perform  
 22 iterations of a script on multiple files, or do  
 23 you know, so that you can just let it go, as  
 24 opposed to doing them one at a time?  
 25 A. I don't know what you

1 mean by "all tools", we're talking about SQL  
2 Server, and SQL Server certainly has the ability  
3 to do that. So I'm not sure --

4 227 Q. You can run one script  
5 and say, "Import the first one, once you're done,  
6 go and find the next file, import that one", and  
7 so forth?

8 A. Yes.

9 228 Q. That's your  
10 understanding, expectation, and that it would be  
11 -- and what happens if you just then let it run  
12 and one of them blocks an importation process? I  
13 take it there's a debugging process?

14 A. It's how you build the  
15 script.

16 229 Q. But the -- sorry,  
17 building the script is -- building the script is  
18 -- includes that debugging process is what I'm --

19 A. If you write it in the  
20 script. I don't think I'm understanding your  
21 question, if --

22 230 Q. So it requires additional  
23 programming to build a script that will import  
24 multiple files, compared to importing a single  
25 file. Or do you know?

1 235 Q. And you'll -- if you look  
2 at the bottom of page 14, underneath that -- we  
3 talked about the IAS Log Viewer, and I won't  
4 address that anymore.

5 A. Yeah.

6 236 Q. But looking at your  
7 estimated time with respect to programming new SQL  
8 script, you say:

9 "Due to the previous law  
10 enforcement request for  
11 the same data, it would  
12 seem reasonable to  
13 conclude that an import  
14 script had already been  
15 developed." (As read)

16 And your evidence was based on  
17 that assumption at the time. That's fair to say?

18 A. Right. And now we know  
19 that they didn't -- they didn't code one.

20 237 Q. If you look at your F,  
21 30(f) on page 15, talking about cloning the  
22 Customer Management Relationship database, the CRM  
23 database is the database that has all the  
24 customer's account information?

25 A. To my knowledge, yes.

1 A. You're pointing the  
2 script at a group of files as opposed to one file.

3 231 Q. That's your  
4 understanding.

5 A. My programmers do it all  
6 the time.

7 232 Q. And, again, in creating a  
8 script, I assume your programmers engage in a  
9 debugging process?

10 A. If they identify any  
11 anomalies then they will correct them.

12 233 Q. Have you ever -- or do  
13 you know whether your programmers have ever come  
14 across an import of this volume of data without  
15 any need for debugging whatsoever? Or do you  
16 know?

17 A. There's oftentimes a  
18 little bit of debugging that's required. In this  
19 case, where it's uniform data of a known  
20 structure, it is less likely, but still possible.

21 234 Q. In any event, you would  
22 want to make sure that the data from each file was  
23 properly inserted into the SQL database before you  
24 ran any queries on the database?

25 A. Yes.

1 238 Q. And -- when you talk  
2 about the customer database not being very large,  
3 as having only 200 to 400,000 records, what you're  
4 talking about there really is 200 and 400,000  
5 accounts or subscribers?

6 A. Subscribers.

7 239 Q. Right. And each  
8 subscriber could have a number of records per  
9 account if you think of a record as a unit of  
10 data?

11 A. Well --

12 240 Q. It would have its  
13 address, it would have its username, it would have  
14 its phone number?

15 A. Correct.

16 241 Q. It would have its use  
17 information --

18 A. That's the record.

19 242 Q. -- for billing purposes?

20 A. Like it's a single  
21 record. In -- for what I was describing here, or  
22 trying to describe, that would be a record.

23 243 Q. But if you multiply that  
24 by 400,000 times -- and there could be as many as  
25 100 or more, many hundreds of entries per

1 subscriber in that database?  
 2 A. For -- for what, support  
 3 calls, or --  
 4 244 Q. Anything from support  
 5 calls, usage, billing, all of those things that we  
 6 just described.  
 7 A. There could be other  
 8 entries, yeah.  
 9 245 Q. And if one were -- and,  
 10 again, I don't want to get you outside your  
 11 comfort zone. If you've not dealt with CRM --  
 12 A. It's a database -- it's a  
 13 database -- it doesn't matter that it's a CRM,  
 14 it's a database that needs to be dismantled or  
 15 detached so that it can be copied and then  
 16 attached to the new server. It's not a  
 17 complicated process.  
 18 246 Q. Even if it's about 380  
 19 gigs in size?  
 20 A. It's just copying the  
 21 file. It's just copying the file.  
 22 247 Q. It's just that that's --  
 23 okay.  
 24 A. It's machine time. You  
 25 copy the file and let it copy.

1 248 Q. And what happens to the  
 2 file at the time? Is it offline while it's being  
 3 copied? Can other people access it?  
 4 A. If it's copied. There's  
 5 different ways you can copy it, but you can take  
 6 it offline and create the copy.  
 7 249 Q. And if you take it  
 8 offline, that means that your entire business  
 9 cannot access your customer record management  
 10 database for the period of time that it takes to  
 11 copy this --  
 12 A. Right. But they could  
 13 have used a backup copy and mounted that.  
 14 250 Q. Do you know whether  
 15 there's a backup copy of TekSavvy's CRM to use?  
 16 A. I don't know their  
 17 internal policies.  
 18 251 Q. And you will agree at  
 19 least that this database contains private  
 20 information?  
 21 A. Yes, sir.  
 22 252 Q. And, again, all we're  
 23 talking here -- I'm not going to spend a lot time  
 24 because I think we are talking about a difference  
 25 between one hour -- and you say one hour would be

1 reasonable, but would two hours spent by TekSavvy  
 2 -- would you also consider that reasonable? It's  
 3 in the range of reason?  
 4 A. Yeah, I mean, you just --  
 5 you're clicking on a file and copying it. It's --  
 6 the human time is almost negligible.  
 7 253 Q. So you're saying that the  
 8 dedication of two hours to copying the main  
 9 personal database is unreasonable, but one hour in  
 10 your time to copy would be?  
 11 A. Either time is  
 12 reasonable.  
 13 254 Q. Okay. If you look then  
 14 at G, "Designing, Programming, Optimising SQL  
 15 Queries". SQL queries, what is optimising a SQL  
 16 query?  
 17 A. It's ensuring that -- I  
 18 mean, these are Mr. Gaudrault's words.  
 19 255 Q. But you understood them,  
 20 I assume?  
 21 A. But it's to ensure that  
 22 the query is being conducted and returning the  
 23 right data.  
 24 256 Q. Sort of a debugging kind  
 25 of process, like we were talking about?

1 A. Kind of, yeah.  
 2 257 Q. In my lawyer language as  
 3 opposed to --  
 4 A. Yeah. It's just making  
 5 sure that you're getting the right records back.  
 6 258 Q. And then when you talk  
 7 about -- so when you talk about what you would  
 8 want a SQL statement to say, in this particular  
 9 case you've written, you said, "I would want the  
 10 SQL statement or SQL query to say this in  
 11 English", presumably you're not programming in  
 12 English, you're trying to program it -- and that's  
 13 why you need programmers to set it up -- but that  
 14 translation from English to SQL query isn't your  
 15 personal bailiwick?  
 16 A. No.  
 17 259 Q. If you ran the English  
 18 statement that you said here, how many records  
 19 would you expect to be returned?  
 20 A. I was just providing an  
 21 example of --  
 22 260 Q. But you would expect that  
 23 --  
 24 A. -- what you would query.  
 25 You know, how the human mind would think of what

1 you're asking the database to return. But the  
2 actual structure of the SQL statement isn't quite  
3 as intuitive.

4 261 Q. How about building  
5 indexes, that -- just to describe that briefly,  
6 that is --

7 A. Click a button and say,  
8 "Build". Well, you have to identify the columns  
9 that you want to build the index on.

10 262 Q. You'll agree that if  
11 you've got a large data query, and your query  
12 isn't optimised, and your data isn't indexed, that  
13 would be -- that would take a lot longer to run  
14 the query itself?

15 A. The query would be a  
16 little bit slower, yeah.

17 263 Q. When you run this query  
18 that you've described in English here, you would  
19 at least assume that you would get multiple lines  
20 for each IP address?

21 A. That was just an example.

22 264 Q. Do you know, I guess, one  
23 way or the other, given that you've got a  
24 database?

25 A. It's not even a valid

1 query, it was just an example of what a query  
2 could look like.

3 265 Q. So you've not try to run  
4 that query? You're trying to give an example in  
5 English at what a query might be about?

6 A. Right.

7 266 Q. But ultimately the goal  
8 would be to try to return the records relating to  
9 a particular IP address in a particular time  
10 range, and there may be multiple IP address  
11 entry -- sorry, multiple entries related to that  
12 IP address in that particular range?

13 A. Right. And I would think  
14 that the query would be to eliminate duplicates,  
15 and present only unique values so that you don't  
16 have multiple entries, you only have one.

17 267 Q. Sorry, which values are  
18 you going to eliminate?

19 A. I would expect that  
20 you're matching an IP -- because that's what  
21 you've been provided by Voltage -- with a user  
22 account for a certain time range. So if the IP  
23 and the user account in a time range match, then  
24 I'm only interested in getting one result back,  
25 not 10, or 50, or...

1 268 Q. And then you have to  
2 access -- and, again, if you've got -- at the very  
3 least, you've agreed that the timestamp wouldn't  
4 show up as a separate entry in the -- in the log,  
5 so you would at least need two entries to sandwich  
6 that timestamp for that IP address?

7 A. I don't think so. If --  
8 if I have a time entry at 90750, which is not an  
9 entry in the log because there was no log at that  
10 specific time, and I returned results potentially  
11 before and after that, for whatever time frame I  
12 decide to return, if the username and IP address  
13 all match, then it's the same user. I only want  
14 to see that once, I don't want to see ten of them  
15 or --

16 269 Q. What I'm saying is the  
17 one before and the one after, there's two. Are  
18 you saying you eliminate one so that you don't  
19 actually know in your output? Or do you want to  
20 see both?

21 A. If you're -- I don't want  
22 to see them. I only want to see the uniques.

23 270 Q. And what -- how many  
24 situations would you expect there to be a  
25 difference between the one before and the one

1 after? Do you have any idea whatsoever?

2 A. No.

3 271 Q. Once you've obtained that  
4 username, you need to cross reference to the CRM  
5 to obtain the personal information?

6 A. You do that  
7 automatically.

8 272 Q. Sorry, you have an  
9 automatic correlation of the output of a query to  
10 the SQL database into a different clone database?  
11 What would you use for that?

12 A. You have two -- you have  
13 two databases: you have your log file database,  
14 or probably just a table; and you have your CRM  
15 database. So you build your query to return a  
16 result, that is the IP and the user ID, whatever  
17 that value is, and you match it against your CRM  
18 and return that result.

19 273 Q. Correlating those two  
20 databases, and searching into the two different  
21 ones separately, with the results of one into the  
22 other, that's how you would program it?

23 A. Yes, I would return the  
24 result --

25 274 Q. But that's, again, not

1 something that you personally program in your  
2 work?  
3 A. Yeah, we do that.  
4 275 Q. Again, I want to just  
5 focus on your --  
6 A. No, no, I'm not a  
7 programmer, I'm not saying I'm a programmer. But  
8 we do that very thing where -- where we're  
9 searching across databases and return the result.  
10 276 Q. And are you aware -- are  
11 you familiar with -- and I'm not sure if we've  
12 covered this before -- are you familiar with the  
13 systems that other ISPs have in place to undertake  
14 automated searches either for notice-and-notice or  
15 responding to law enforcement? Do you have any  
16 knowledge of that?  
17 A. No, and I have no  
18 knowledge of TekSavvy's, except to the extent of  
19 what has been provided in their affidavits.  
20 277 Q. And you don't have SQL  
21 training yourself?  
22 A. I do have SQL training.  
23 278 Q. You do have SQL training,  
24 but you're not a -- that's not your day-to-day,  
25 you manage --

1 A. No, it's not.  
2 279 Q. And, again, I apologize  
3 if I've asked these, because I'm starting to feel  
4 that I may have: In terms of other ISPs, you  
5 don't know how long it took them to put in place a  
6 structure that would allow --  
7 A. No.  
8 MR. MCHAFFIE: Great, those  
9 are the questions I have. Thanks very much.  
10 THE WITNESS: Thank you, sir.  
11 RE-EXAMINATION BY MR. ZIBARRAS:  
12 280 Q. Just a short  
13 re-examination. Mr. Rogers, you were asked about  
14 the RADIUS log files and if you knew how the  
15 RADIUS log files were created. Does it make a  
16 difference how the RADIUS log files are created?  
17 A. No, it doesn't make a  
18 difference.  
19 281 Q. Who would know how these  
20 RADIUS log files are created?  
21 A. The person that was  
22 managing the network.  
23 282 Q. Okay. You were asked a  
24 lot of questions about bugs that may arise during  
25 these processes, including decompressing and

1 transferring data.  
2 A. There was nothing  
3 identified in Gaudraul's affidavit, so I didn't  
4 address any of that.  
5 283 Q. All right. Well, let me  
6 ask you this: If one is dealing with own's own  
7 servers and one's own information, would that have  
8 any effect on the amount of potential bugs that  
9 are going to be -- that would arise when data is  
10 being then analysed?  
11 A. Well, you would think  
12 they would be more intimately aware of their  
13 network resources, and what's being written to  
14 their log files, and they should have a higher  
15 level of understanding of any issues with the data  
16 that they're storing.  
17 284 Q. All right. And then when  
18 you say they should have a higher awareness, would  
19 that apply as well to how the RADIUS log files are  
20 set up and stored?  
21 A. Well, they would know how  
22 -- they're the ones that set them up, so they  
23 would know how they're set up and stored.  
24 285 Q. Okay. And you made a  
25 distinction between human hours and machine hours,

1 I just want to be clear: What do you mean by  
2 "machine hours"?  
3 A. The process to do  
4 something like copy the -- copy the log files from  
5 the data centre to a remote location for the  
6 purposes of decompressing them and working with  
7 them. Copying the files is going to take some  
8 time, so that's machine time. The click and drag  
9 to begin that copy would be human time.  
10 286 Q. Okay.  
11 A. While the files are  
12 copying, the human can go do something else.  
13 287 Q. Right. So if the machine  
14 time is in process, how much human time does it  
15 need, associated human time does it need, once the  
16 process has started?  
17 A. If it's a long machine  
18 time process, typically a human will check on it  
19 to make sure that it's still continuing. That's  
20 just a -- you know, depending on how long the  
21 machine time is, the human would just come back  
22 and check on it, and make sure that it's still  
23 continuing, and then go about their work.  
24 288 Q. Do you have any idea how  
25 much machine time would be involved in a process

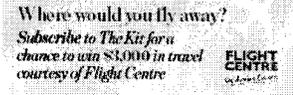
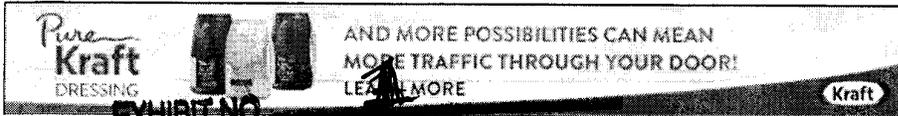
1 like this? Is it minutes, is it hours, is it  
2 days?  
3 A. Well, depending how they  
4 copied the data from the data centre, and how they  
5 undertook the decompression of the files. Those  
6 appear to be, you know, the largest potential for  
7 machine time as opposed to human time. And I'm  
8 not sure exactly what they undertook, so I'm not  
9 sure the amount of machine time compared to human.  
10 289 Q. Once an SQL script has  
11 been created, as one was in this case, is it easy  
12 to -- in future -- use that same script to perform  
13 the same function?  
14 A. Yes.  
15 290 Q. With different data?  
16 A. For sure, yeah.  
17 291 Q. So creating an SQL script  
18 is a one-time exercise?  
19 A. Yes, it -- for this to be  
20 used against the same data you may have to, you  
21 know, amend it a little bit depending on what the  
22 data structure is like. But absolutely it can be  
23 reused.  
24 292 Q. Do you have any  
25 knowledge, based on what you've reviewed or what

1 you heard yesterday, that any data was taken  
2 offline for any part of these searches?  
3 A. No.  
4 293 Q. You were also asked a lot  
5 of questions about RADIUS log files. Are RADIUS  
6 log files different to any other data storage  
7 files in any significant way?  
8 A. Well, they're a flat file  
9 that stores authentication data, so I'm not really  
10 sure how to respond to that question.  
11 294 Q. And the last question:  
12 You said that a properly programmed SQL search  
13 would identify the IP address on either side of a  
14 15-minute increment around the timestamp. And if  
15 the IP address was the same on either side, then  
16 it would just generate one result?  
17 A. Yeah, I was using a  
18 15-minute increment based on the information that  
19 the log files -- absent a logoff or logon -- is  
20 regenerating -- or generating an event every  
21 15 minutes. So limiting the query to a 15-minute  
22 window seems like a reasonable response time,  
23 which, generally speaking, would probably only  
24 return two results. But I still only want to see  
25 one -- in the event that it returned more, I'm

1 only interested in one, as long as they are all  
2 matches.  
3 295 Q. But it's possible to  
4 program it so that if the two results match, it  
5 just gives you one --  
6 A. Yes.  
7 296 Q. All right --  
8 MR. MCHAFFIE: Technically  
9 speaking, I think in re-examination you shouldn't  
10 be asking closed-ended questions like that.  
11 MR. ZIBARRAS: Sure.  
12 MR. MCHAFFIE: But you're not  
13 cross-examining your witness. If you didn't like  
14 the answer he gave you, you're sort of stuck with  
15 it. But, I mean, in all of this I think we're  
16 getting well beyond proper re-examination. But at  
17 the very least, don't make them closed-ended  
18 questions.  
19 MR. ZIBARRAS:  
20 297 Q. Well, I just want to  
21 follow up with one last question: If based on a  
22 properly programmed SQL script there are single  
23 results outputted, how much manual time would you  
24 say would be reasonable to -- in then dealing with  
25 the results? How much reasonable manual time

1 would follow human manual time, would follow that  
2 process?  
3 A. Well, what we're trying  
4 to do here is match a log event with a customer,  
5 so in -- I would have had my team program the  
6 results so that it pulls the required information  
7 from the customer database so that there's no real  
8 manual intervention at that point. You get the  
9 single event from the log, and you get the  
10 customer information from the customer database.  
11 MR. ZIBARRAS: Okay, thank  
12 you.  
13 --- Whereupon the examination concluded at  
14 12:14 p.m.  
15  
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EXHIBIT 1



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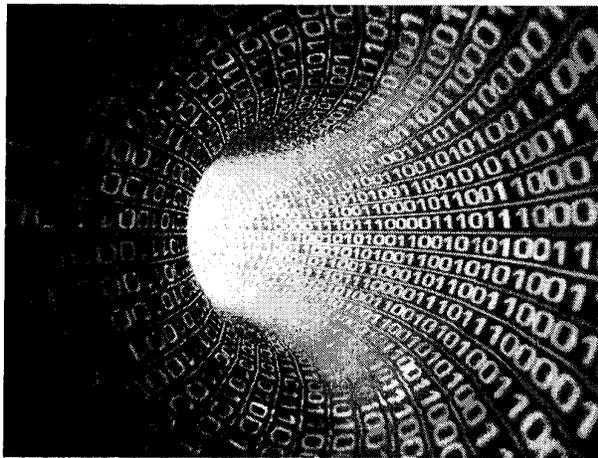


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Last month, Canada's top court struck a blow against warrantless disclosure of subscriber information, ruling that there is a reasonable expectation of privacy in that information and voluntary disclosures amount to illegal searches

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A little-noticed 2013 document from Public Safety Canada released under the Access to Information Act indicates Canadian law enforcement agencies have been making more than a million requests annually to ISPs for basic subscriber information for years. DREAMSTIME

By: Michael Geist Technology. Published on Fri Jul 18 2014

Canadian Internet and telecom providers have, for many years, disclosed basic subscriber information, including identifiers such as name, address, and IP address, to law enforcement without a warrant. The government has not only supported the practice, but actively encouraged it with legislative proposals designed to grant full civil and criminal immunity for voluntary disclosures of personal information.

Last month, the Supreme Court of Canada struck a blow against warrantless disclosure of subscriber information, ruling that there is a reasonable expectation of privacy in that information and that voluntary disclosures therefore amount to illegal searches.

The decision left little doubt that Internet and telecom providers would need to change their disclosure policies. This week, Rogers, the country's largest cable provider, publicly altered its procedures for responding to law enforcement requests by announcing that it will now require a court order or warrant for the disclosure of basic subscriber information to law enforcement in all instances except for life threatening emergencies (warrantless disclosures may still occur where legislation provides the lawful authority to do so). Telus advised that it has adopted a similar approach.

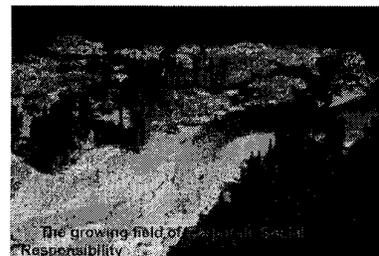
The change in policy, which should ultimately be mirrored by all Canadian providers, will have a massive impact on how law enforcement operates and on the privacy of millions of Canadians. Simply put, the number of government requests for subscriber information has been staggering, most of which occur without court oversight.

A 2011 document supplied to the Privacy Commissioner of Canada advised of 1.2 million requests for subscriber information affecting roughly 750,000 account holders.



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While that revelation garnered media headlines across the country, a little-noticed 2013 document from Public Safety Canada released under the Access to Information Act indicates that in excess of a million requests annually has been standard for years.

The document states that ITAC members (the Information Technology Association of Canada that counts major telecom providers among its members) "handled 1,130,000 basic subscriber information requests annually from 2006 to 2008."

As Canadian telecom and Internet providers race to comply with the law by reversing longstanding practices, law enforcement and the government must also catch up. Law enforcement will rarely seek voluntary disclosure (except in exigent circumstances) since it is likely to be treated as an illegal search and the resulting information will be inadmissible in court.

Meanwhile, Justice Minister Peter MacKay faces an important decision. With law enforcement not seeking voluntary disclosure of personal information and providers requiring a warrant, the government's proposed immunity provision in Bill C-13 now seems inoperable since it is contingent on a lawful voluntary disclosure, which customer name and address information is not.

The Canadian government could adopt the "bury our heads in the sand approach" by leaving the provision unchanged, knowing that it will be unused or subject to challenge. That would run counter to the spirit of the Supreme Court ruling, however, and do nothing to assist law enforcement.

If the government is serious about providing law enforcement with the tools they need to address online harms, it will drop the voluntary disclosure immunity provision in Bill C-13 and its companion proposal in Industry Minister James Moore's Bill S-4, which seeks to expand voluntary disclosure in non-law enforcement cases.

In their place, a new subscriber information warrant could be developed that ensures court oversight, an appropriate evidentiary standard given the Supreme Court's finding of the privacy import of such information, and a system to allow law enforcement to apply for a subscriber information warrant expeditiously.

While government MPs were unmoved during committee hearings by repeated expression concerns from experts about the voluntary disclosure provisions, the Supreme Court decision effectively reshaped Canadian privacy law and has forced everyone to rethink longstanding practices. As Internet and telecom providers change their approach, the big question is whether the government is prepared to do the same.

Michael Geist holds the Canada Research Chair in Internet and E-commerce Law at the University of Ottawa, Faculty of Law. He can be reached at mgeist@uottawa.ca or online at www.michaelgeist.ca .

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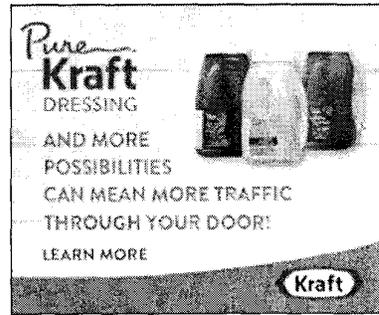
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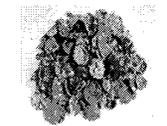
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1 Toronto, Ontario  
 2 --- Upon commencing on Thursday, October 9, 2014  
 3 at 4:17 p.m.  
 4 AFFIRMED: JOHN PHILPOTT  
 5 CROSS-EXAMINATION BY MR. MCHAFFIE:  
 6 MR. ZIBARRAS: I just want to  
 7 say that we don't intend to waive privilege today,  
 8 and I will try and raise the objection if the  
 9 questions kind of go there, but --  
 10 MR. MCHAFFIE: It's  
 11 certainly --  
 12 MR. ZIBARRAS: But since I've  
 13 been sitting here for six hours, I might have --  
 14 MR. MCHAFFIE: My intention is  
 15 not to -- to seek to get you to waive privilege  
 16 either, and my -- although I will be asking  
 17 questions about the factual issues in here, and  
 18 think that the questions that surround it are fair  
 19 questions.  
 20 MR. ZIBARRAS: Okay. Thank  
 21 you.  
 22 MR. MCHAFFIE:  
 23 1 Q. So, Mr. Philpott, you  
 24 have a copy of your July 31, 2014 affidavit in  
 25 front of you I see?

1 A. I think the affidavit in  
 2 paragraphs 2 through 4 speaks for itself. And  
 3 where there's other evidence in other affidavits  
 4 that will be before the Court in this motion, but  
 5 generally the headings deal with the paragraphs  
 6 that fall under the headings.  
 7 Q. Right. And the Court  
 8 will make its own conclusions no doubt on  
 9 Mr. Zibarras' skilful argument. What I'm looking  
 10 for is your factual evidence rather than what's in  
 11 the others. That's fair?  
 12 A. I don't know what you're  
 13 looking for.  
 14 Q. Right. In terms of the  
 15 questions that I ask you, I'm asking for your  
 16 factual information and not what may be in other  
 17 affidavits or evidence before the Court.  
 18 A. Okay.  
 19 Q. Okay? So in terms of the  
 20 information that you have put forward to the Court  
 21 with respect to TekSavvy facilitating unauthorized  
 22 reproduction and distribution of copyrighted  
 23 material, it is, and is only, that Canipre's  
 24 investigation located IP addresses that were  
 25 assigned by TekSavvy? That's what you put

1 A. I do.  
 2 Q. If I can ask you to turn  
 3 to -- turn to the first page. It's already up.  
 4 The first page, you've got a heading there,  
 5 "TekSavvy Facilitates the Unauthorized  
 6 Reproduction and Distribution of Copyrighted  
 7 Material". That's a conclusion that you're asking  
 8 the Court to come to on the basis of the  
 9 information that you provide in paragraphs 2, 3,  
 10 and 4?  
 11 A. It's a heading that  
 12 paraphrases paragraphs 2, 3, and 4. I'd say  
 13 that's fair.  
 14 Q. And in particular, it's  
 15 based on the fact that Canipre's investigation  
 16 yielded IP addresses assigned to TekSavvy?  
 17 A. That was the result of  
 18 Canipre's investigation, to my understanding, yes.  
 19 Q. And in terms of the  
 20 information that you present in paragraphs 2, 3,  
 21 and 4, that's the only information that you talk  
 22 about vis-à-vis TekSavvy, that would support the  
 23 heading that you've given, is the fact that  
 24 Canipre's investigation identified IP addresses  
 25 that were assigned to TekSavvy?

1 forward?  
 2 A. My understanding is that  
 3 Canipre conducted an investigation that revealed  
 4 that customers of TekSavvy were using their  
 5 internet access through TekSavvy to upload and  
 6 download copyrighted materials owned by Voltage  
 7 Pictures.  
 8 Q. All right. And did  
 9 Canipre's investigation, to your knowledge, also  
 10 yield IP addresses assigned to other ISPs?  
 11 A. I just don't want to get  
 12 into anything that's falling potentially under  
 13 litigation privilege.  
 14 Q. Okay. You were saying  
 15 that you can conclude from the fact that TekSavvy  
 16 users used their TekSavvy access to engage in the  
 17 alleged copyright infringement as supporting this  
 18 "TekSavvy facilitates" statement. So I'm just  
 19 wanting to, I guess, figure out the extent to  
 20 which that statement also applies to any other  
 21 ISP; in other words, name an -- pick an ISP,  
 22 "facilitates the unauthorized reproduction and  
 23 distribution of copyrighted material", because  
 24 they also showed up on Canipre's list.  
 25 A. Well, you've asked me to

1 stick to the facts --  
 2 10 Q. Right.  
 3 A. -- in my affidavit. My  
 4 affidavit only deals with TekSavvy. If you want  
 5 to get into my layman's understanding of --  
 6 11 Q. No, I guess what I'm  
 7 asking for is not just the facts in your  
 8 affidavit, which I can read, but the facts that,  
 9 you know, that relate to the information in your  
 10 affidavit.  
 11 MR. ZIBARRAS: All right. Let  
 12 me just maybe say this: We already know  
 13 Mr. Logan's evidence, which was that he did an  
 14 investigation on either ISPs.  
 15 MR. MCHAFFIE: Right.  
 16 MR. ZIBARRAS: He was the best  
 17 person to give that, so I don't know that  
 18 Mr. Philpott can --  
 19 MR. MCHAFFIE:  
 20 12 Q. I'm wondering did  
 21 Mr. Philpott know that, at the time of swearing  
 22 this affidavit, that there were other ISPs that  
 23 showed up on the list?  
 24 A. I was aware that Canipre  
 25 conducted investigations that dealt with other

1 evidence on that today, what the comparative  
 2 ratios are between one and the another, and  
 3 because I think you said you don't recall?  
 4 A. I'm just here to answer  
 5 your questions.  
 6 16 Q. Right. So you have no  
 7 information to say, and you don't give evidence in  
 8 your affidavit to say what their comparative  
 9 ratios are? I just want to get into -- when you  
 10 say "Potentially you could do this, potentially  
 11 you could do that", I don't want to get you into  
 12 speculation.  
 13 A. It's a question that  
 14 invites speculation, as to whether one is  
 15 facilitating or not. It's a more complicated  
 16 question. I'm unable to answer it today because  
 17 it would require an investigation that's probably  
 18 out of the scope of this hearing.  
 19 17 Q. You then have the heading  
 20 "TekSavvy Forces Voltage to Bring the Rule 238  
 21 Motion", and you note that:  
 22 "TekSavvy maintained that  
 23 it would not provide the  
 24 contact information of  
 25 individuals whose IP

1 ISPs. I don't have a clear recollection as to the  
 2 ratios, of how many customers to potential  
 3 infringers there were. So I don't want to  
 4 speculate. So with that caveat aside, my  
 5 understanding was that TekSavvy had a pretty high  
 6 ratio.  
 7 13 Q. But there were others  
 8 that were involved, other ISPs were on that list,  
 9 and my question is: With respect to those ISPs,  
 10 would you also ask the Court to conclude that  
 11 those other ISPs, on the basis of appearing on  
 12 that list, facilitated the unauthorized  
 13 reproduction and distribution of copyrighted  
 14 material?  
 15 A. We deal with each one on  
 16 a case-by-case basis.  
 17 14 Q. So some facilitate and  
 18 some don't?  
 19 A. Well, I'd say there's  
 20 levels. So if you look at just a particular ISP,  
 21 if say a larger portion of infringing is happening  
 22 with one ISP versus other ISPs, then one could  
 23 potentially draw that conclusion, that some are  
 24 facilitating and some aren't.  
 25 15 Q. But you're not giving

1 addresses were used in  
 2 the authorized copying  
 3 and distribution of  
 4 Voltage's film over the  
 5 internet without a court  
 6 order." (As read)  
 7 That's paragraph 5. I guess  
 8 just for correction, I assume you meant the  
 9 "unauthorized" copying and distribution?  
 10 A. I did mean the authorized  
 11 copying and distribution?  
 12 18 Q. Sorry, "un", there should  
 13 be an "un"?  
 14 A. "Unauthorized", yes.  
 15 Thank you.  
 16 19 Q. You're not saying that  
 17 that is an inappropriate position, or you're just  
 18 making a comment about it? You're just stating it  
 19 as a fact?  
 20 A. The heading or the  
 21 paragraph?  
 22 20 Q. No, the position that  
 23 TekSavvy maintained, i.e. that they would not  
 24 provide information without a court order, do you  
 25 think that was proper, appropriate, inappropriate,

1 improper, or are you not even saying one way or  
 2 the other?  
 3 MR. ZIBARRAS: Do you want his  
 4 opinion on --  
 5 MR. MCHAFFIE: No, I'm just  
 6 wondering why he's put this in here. He says  
 7 TekSavvy forced Voltage.  
 8 21 Q. And you're saying  
 9 TekSavvy forced Voltage by requiring an order?  
 10 That's what you're saying?  
 11 A. Well, by requiring a  
 12 motion. Now TekSavvy is effectively a witness in  
 13 this proceeding that has information that Voltage  
 14 needs, and so this whole process could have gone a  
 15 lot quicker and cheaper had everyone just worked  
 16 cooperatively, and had issues been dealt with on  
 17 consent. And that's what we sought to do in the  
 18 beginning, but things got drawn out, and got more  
 19 costly, in part due to some of the positions taken  
 20 by TekSavvy.  
 21 22 Q. Okay. So what I'm asking  
 22 you about is the first paragraph in -- sorry,  
 23 first sentence in paragraph 5, where you say that  
 24 their position that they're talking about is that  
 25 they would not provide it without a court order.

1 A. Yeah. But there's a  
 2 difference between consenting and not opposing and  
 3 opposing.  
 4 25 Q. But what you're talking  
 5 about here is Voltage having to bring the motion,  
 6 and you suggested TekSavvy forced Voltage to bring  
 7 the motion. Am I hearing you right, that, in  
 8 fact, Voltage would have had to bring the motion  
 9 if it wanted the order regardless? It wasn't  
 10 TekSavvy that forced Voltage to bring the motion?  
 11 A. I don't know. There has  
 12 been a lot of newspaper articles about ISPs  
 13 providing contact information.  
 14 26 Q. Voluntarily without an  
 15 order?  
 16 A. Voluntarily without court  
 17 orders. I'm not sure whether TekSavvy is one of  
 18 them, or not. But the Privacy Commissioner, I  
 19 think, issued a report, that has just come to my  
 20 attention, through newspaper articles, and so I  
 21 understand multiple ISPs are providing information  
 22 without court orders.  
 23 27 Q. Or were before Spencer.  
 24 Fair to say? You're familiar with Spencer?  
 25 A. I'm familiar with the

1 That was their position, and you knew that was  
 2 their position?  
 3 A. Yeah. And what we were  
 4 seeking was contact information. Now I didn't  
 5 think it was -- in my view, my personal view --  
 6 unreasonable for TekSavvy not to -- for TekSavvy  
 7 to desire a court order to do that, despite other  
 8 aspects of their privacy policy, saying that  
 9 someone's phone number, e-mail address, address,  
 10 name and contact information, is not something  
 11 that's considered personal information, or private  
 12 information; that notwithstanding, my  
 13 understanding of these types of motions is that  
 14 court orders are typically -- typically taken out,  
 15 but often on consent.  
 16 23 Q. So TekSavvy did not force  
 17 Voltage to bring the motion, Voltage had to bring  
 18 the motion in order to get the order? That's  
 19 fair?  
 20 A. TekSavvy as a party with  
 21 information on individuals that were potentially  
 22 doing unlawful acts, could have consented to the  
 23 motion, and it didn't.  
 24 24 Q. You would still have had  
 25 to bring the motion. That's right?

1 case, yeah.  
 2 28 Q. Okay. At the very least,  
 3 you recognize or you understand that Prothonotary  
 4 Aalto understood that it was quite proper for  
 5 TekSavvy not to reveal the information without a  
 6 court order?  
 7 MR. ZIBARRAS: Well, I don't  
 8 want him to comment on what Prothonotary Aalto  
 9 thought.  
 10 MR. MCHAFFIE: Well, no, what  
 11 he said.  
 12 MR. ZIBARRAS: Okay, well --  
 13 MR. MCHAFFIE: Presumably he  
 14 said --  
 15 MR. ZIBARRAS: We all have  
 16 Prothonotary Aalto's decision.  
 17 MR. MCHAFFIE:  
 18 29 Q. And were you familiar  
 19 with Spencer at the time you swore this affidavit?  
 20 A. I don't recall.  
 21 30 Q. In paragraph 10 you say  
 22 that at no point was TekSavvy a party to the  
 23 litigation. You'll agree that they were a  
 24 responding party to the motion?  
 25 A. That's a legal question,

1 but that would fit with my legal understanding.  
2 31 Q. Okay. So when you say  
3 "At no point was TekSavvy a party to the  
4 litigation", they were not a Defendant, they were  
5 not a Plaintiff, but they were definitely a party  
6 to the motion?

7 A. I would consider them to  
8 be a witness effectively.

9 32 Q. Not a responding party to  
10 the motion?

11 A. In this case both.

12 33 Q. And looking at the  
13 paragraphs in paragraph 11 and following, that  
14 deal with the question of notice, Voltage took the  
15 position that the individuals affected should have  
16 their personal information revealed without having  
17 been given notice that it was a subject and motion  
18 of a court? That was the position of Voltage?

19 A. I'm not sure what you  
20 mean by "personal information". I'm talking about  
21 -- if we're talking about contact information,  
22 peoples' names and addresses --

23 34 Q. Mm-hmm.

24 A. -- again, under  
25 TekSavvy's privacy policy, it doesn't consider

1 A. It's not a customary step  
2 in these types of motions, to my understanding.  
3 And whether it was necessary or not, with the  
4 benefit of hindsight it appears the purpose of  
5 this was so the people who could potentially be  
6 identified as being associated with those IP  
7 addresses could show up before Prothonotary Aalto,  
8 or through another means, and have their day in  
9 court, even though they'd probably be identifying  
10 themselves by doing that, but that they could  
11 appear at the motion to speak to it one way or  
12 another.

13 With the benefit of hindsight,  
14 we know that no one appeared. So I think at the  
15 time, whether it was necessary or not, maybe  
16 reasonable people could disagree, Voltage's view  
17 is unnecessary. I think Voltage's view is  
18 vindicated by what actually happened.

19 39 Q. So to get back to the  
20 question, regardless of whether reasonable people  
21 are -- I was just asking about Voltage's position.  
22 Voltage's position, to be clear, was that notice  
23 ought not to be provided to the affected  
24 individuals before the court hearing? That's all  
25 the question was. That was Voltage's position?

1 e-mail addresses, phone numbers, names and  
2 addresses to be personal information. So are you  
3 just referring to contact information?

4 35 Q. I'm referring to the  
5 information that you were seeking by way of court  
6 order.

7 A. Okay, which I understand  
8 to be contact information.

9 36 Q. All right.

10 A. Okay.

11 37 Q. But you say that that  
12 contact information in this context is not  
13 personal information?

14 A. I don't see how my view  
15 on that is relevant. I'm just noting what  
16 TekSavvy's privacy policy is.

17 38 Q. Right. What I'm trying  
18 to get to is the position that you're saying,  
19 TekSavvy said there was an unnecessary -- you're  
20 saying that notice to those individuals was  
21 unnecessary, that's what Voltage's position was?  
22 That's all I'm saying. Voltage's position was  
23 that the affected individual should not receive  
24 notice before the matter went to the Court? That  
25 was your position?

1 A. I think I answered it,  
2 that I said that Voltage's position was that it  
3 was unnecessary, and that position seems to have  
4 been vindicated through what actually happened,  
5 because no one who received this notice actually  
6 appeared at the hearing, or otherwise attempted to  
7 contact our office.

8 40 Q. Whether that amounts to  
9 vindication we can talk about before the  
10 prothonotary. But I'm -- whether -- so we'll  
11 leave that question aside.

12 A. Okay. I was always  
13 perplexed as to what it was attempting to achieve.  
14 My understanding was that it was so that people  
15 could show up at the hearing. No one did show up  
16 at the hearing. Again, we were seeking the  
17 contact information. So if anyone appeared, then  
18 we would know who they were through them  
19 appearing.

20 41 Q. Okay, we'll get to that,  
21 what the implications of notice provisions and the  
22 requirement to give notice before a person's  
23 individual rights are affected, what that means.  
24 Let's not get into an academic debate now.  
25 Paragraph 13 -- and do you

Page 19

1 know, in terms of whether anybody -- whose rights  
2 were affected -- when you say "didn't show up at  
3 the hearing", you mean didn't make any  
4 representations? That's what you mean? Like they  
5 didn't appear from a -- from a legal perspective,  
6 you don't know whether they were in the courtroom  
7 or not?

8 A. I have no knowledge that  
9 anyone who received the notice to -- any steps  
10 whatsoever, other than perhaps to call TekSavvy's  
11 customer service line, or something like that.

12 42 Q. You wouldn't know if they  
13 obtained legal advice? You wouldn't know that?

14 A. Like I would know if any  
15 -- yeah.

16 43 Q. That's true? You  
17 wouldn't know whether they -- what they did in  
18 response to that information was get legal advice,  
19 you wouldn't know that?

20 A. I have no knowledge that  
21 anyone sought legal advice.

22 44 Q. You wouldn't -- if they  
23 chose not to appear -- and as you say, nobody  
24 appeared either in person or anonymously in the  
25 form of actually appearing before the Court -- you

Page 20

1 don't know what the basis for that decision was  
2 either?

3 A. You're asking me my  
4 understanding of other hypothetical people I  
5 haven't met and what they were thinking?

6 45 Q. Exactly, you don't know?

7 MR. ZIBARRAS: No. All right

8 --

9 MR. MCHAFFIE:

10 46 Q. Right. That's all it is.  
11 I mean, you're trying to draw conclusions about  
12 the fact that they didn't show up. What I'm  
13 saying is: You don't know the information or the  
14 reasons as to why they didn't show up?

15 A. If all those people  
16 contacted me, I'd probably say, "Why don't you  
17 just wait and see if they get the order, and the  
18 time to get involved would be after."

19 47 Q. But none of them did?  
20 Did any of them?

21 A. Well, I wouldn't expect  
22 them to contact me, I was counsel for the  
23 Plaintiff.

24 48 Q. At paragraph 13 you refer  
25 to an attached -- an exchange that you and I had

Page 21

1 back in November of 2012. And if you can actually  
2 turn up that Exhibit F, this isn't the full  
3 exchange, but you -- it appears you've got one  
4 e-mail on November 15. Then it seems to block  
5 some stuff out, but over on the second page you've  
6 got an e-mail that -- or part of an e-mail -- that  
7 comes from me to you on November 15, 2012. You  
8 got that in front of you?

9 A. I don't think anything is  
10 blocked out from one page to the next. The white  
11 space, I think, was just something to do with  
12 printing. But it says "Regards", and then if you  
13 go to the next page we see Nick McHaffie.

14 49 Q. Gotcha. I see, so the  
15 Nick McHaffie was the bottom "Regards" to  
16 November 15. Gotcha. Okay, that explains that  
17 white space.

18 A. I think so, yeah.

19 50 Q. It just may have printed  
20 to the top even though what was -- okay.

21 A. Yeah, I'm not sure why it  
22 printed that way, but I don't think anything is  
23 blocked out.

24 51 Q. All right. So really  
25 what I'm turning then -- in terms of

Page 22

1 November 15 -- that e-mail that's on the second  
2 page, in the third paragraph that starts "In terms  
3 of timing", you received information on  
4 November 15 that:

5 "In this regard, you will  
6 appreciate that given the  
7 mass of information that  
8 is being sought, and the  
9 size of TekSavvy, it is a  
10 substantial undertaking  
11 for TekSavvy, and one to  
12 which it will have to  
13 dedicate significant  
14 resources away from the  
15 operations of its  
16 business." (As read)

17 You were advised that that was  
18 going to be a substantial undertaking that  
19 required dedication of significant resources on  
20 November 15?

21 A. I received this e-mail --  
22 I think we also conveyed to TekSavvy that if it  
23 was going to go this route, of providing notice  
24 ahead of any order being granted, that it was  
25 something it was doing voluntarily on its own

Page 23

1 volition.

2 52 Q. All right. But when  
3 we're talking about -- what is being talked about  
4 in this paragraph is working on retrieving  
5 information based on the information provided?

6 A. Well, it says what it  
7 says.

8 53 Q. Right. And so what we're  
9 talking about is the completion of the data  
10 compilation that was being sought in the order by  
11 Voltage, that's what's being talked about here:

12 "Once this information is  
13 confirmed, I understand  
14 that TekSavvy expects to  
15 be in a position of  
16 having completed the data  
17 compilation within 10 to  
18 15 days. In this regard  
19 you will appreciate that  
20 given the mass of  
21 information"

22 -- and the sentence I just

23 read --

24 "Once TekSavvy has this  
25 information in hand, it

Page 25

1 November 28, and my understanding is that the work  
2 was completed around December 4 or 5.

3 55 Q. Fourth.

4 A. Fourth, okay. So whether  
5 that's an substantial undertaking or not is --  
6 it's a matter of characterization.

7 56 Q. In any event, you were  
8 advised on November 15 that it was going to be a  
9 substantial undertaking, and dedicate significant  
10 resources, and Voltage chose to continue in the  
11 light of that information that was coming from  
12 TekSavvy?

13 A. I received your e-mail,  
14 we conveyed to TekSavvy that it was providing  
15 notice to its customers on its own volition and  
16 voluntarily. Once we did provide our final list  
17 to TekSavvy, all the work was done between  
18 November 28 and December 4.

19 57 Q. So getting back to the  
20 question, after receiving this e-mail, Voltage  
21 elected, chose to continue with its -- with its  
22 motion?

23 A. After receiving this  
24 e-mail and conveying to TekSavvy that it was --  
25 that it -- the idea of providing notice ahead of

Page 24

1 will better be able to  
2 advise as to the number  
3 of IP addresses that it  
4 is unable to correlate  
5 and the reasons." (As  
6 read)

7 So it's talking -- this  
8 paragraph is talking about the correlation of IP  
9 addresses to, as you say, contact information.  
10 Yes?

11 A. Well, it's your e-mail.

12 54 Q. Yes, but I'm asking what  
13 you understood and what you were advised of.

14 A. It speaks for itself. I  
15 don't know, to me your e-mail speaks for itself,  
16 as to whether it was a substantial undertaking.  
17 The -- in your e-mail you say:

18 "Once the information is  
19 confirmed, you understand  
20 that it will take 10 to  
21 15 days, and that's a  
22 substantial undertaking."  
23 (As read)

24 The information that was  
25 requested to be correlated was provided on

Page 26

1 any order being issued was something it was doing  
2 voluntarily and on its own volition.

3 58 Q. In terms of identifying  
4 the names and/or the contact information  
5 associated with an IP address, do you have any  
6 technical information that would suggest that that  
7 would be a more expensive process, whether done  
8 after an order, or before an order?

9 A. After or before, no. But  
10 in seeing the way that TekSavvy did it, it may  
11 have been more costly to TekSavvy.

12 59 Q. But you're not the  
13 technical guy who would give an opinion on that.  
14 I don't need to get into that with you. That's  
15 fair?

16 A. Well, that would only be  
17 in regards to costs associated with dealing with  
18 customer service calls and everything else. If  
19 the notice had not come from TekSavvy, but had  
20 come from Voltage, then Voltage would be dealing  
21 with the brunt of people calling, and those types  
22 of things.

23 60 Q. Do you know that? Do you  
24 speculate as to that, as to whether people would  
25 call Voltage or its ISP and -- do you know that at

1 all? Or is that just your speculation?  
 2 A. It just seems like common  
 3 sense to me.  
 4 61 Q. When you talk about four  
 5 days in paragraph 18 -- sorry, the heading above  
 6 paragraph 18 -- you mean the four business days  
 7 that you refer to in paragraph 20?  
 8 A. Between November 28 and  
 9 December 4.  
 10 62 Q. Right. And that excludes  
 11 one or the other of November 28 and December 4?  
 12 It's five business days, if work was started on  
 13 the 28th and finished on the 4th.  
 14 A. I'll take your word for  
 15 it.  
 16 63 Q. And there's a weekend in  
 17 the middle?  
 18 A. Yeah, I don't think  
 19 there's anything controversial --  
 20 64 Q. Right. And you have no  
 21 knowledge of whether there was work done on that  
 22 weekend at TekSavvy?  
 23 A. So in paragraph 20 I say  
 24 this was four business days from the time I  
 25 provided the data file. I don't think there's

1 anything misleading there.  
 2 65 Q. I'm not asking you  
 3 whether it's misleading, I'm just asking you to  
 4 confirm that you have no knowledge that -- as to  
 5 whether work was undertaken on the weekend so as  
 6 to make the total days that was worked on six days  
 7 or seven days instead of four days or five days.  
 8 That's fair?  
 9 A. I don't work at TekSavvy,  
 10 I don't know if they work on the weekends or not.  
 11 66 Q. And you don't know how  
 12 long the days that they were working in that time  
 13 period were either. That's fair?  
 14 A. I don't work there, I  
 15 don't know what types of hours they keep.  
 16 67 Q. And you knew that prior  
 17 to November 28 work had been undertaken at  
 18 TekSavvy?  
 19 A. I understood that it had  
 20 not -- from what I received from TekSavvy's  
 21 counsel -- that work couldn't be undertaken until  
 22 the issue of the precise time zones and date and  
 23 time had been dealt with, and the correspondence  
 24 between November 15 and November 28 -- this is  
 25 attached as exhibits to this affidavit -- dealt

1 with that.  
 2 68 Q. All right. And we looked  
 3 at that one -- the e-mail that we just talked  
 4 about on November 15, which said, among other  
 5 things:  
 6 "TekSavvy has been and  
 7 will continue to work  
 8 toward retrieving  
 9 information based on the  
 10 information provided,  
 11 even prior to having been  
 12 served with your motion  
 13 materials." (As read)  
 14 So you knew that TekSavvy had  
 15 been, and would continue to work on retrieving the  
 16 information outside the November 28 to December 4  
 17 period?  
 18 A. I had no specific  
 19 knowledge as to what they were doing. I knew I  
 20 was being told that without this critical piece of  
 21 information regarding the time zone, that TekSavvy  
 22 couldn't complete that work, and that was conveyed  
 23 again in the e-mail of November 19 at tab H.  
 24 69 Q. Couldn't complete the  
 25 work. You knew that they had done clearly enough

1 reviewing and analysing to identify the time zone  
 2 issue and the date format issue?  
 3 A. Everything I knew is  
 4 contained in the e-mails I received from you on  
 5 that issue.  
 6 70 Q. All right. Okay. You  
 7 can turn up paragraph 39. You refer to the  
 8 June 25, 2013 hearing date. You say:  
 9 "The moving party was  
 10 Voltage, the opposing  
 11 party was CIPPIC"  
 12 -- CIPPIC was actually an  
 13 intervener?  
 14 A. CIPPIC was an intervener  
 15 that opposed the motion.  
 16 71 Q. Right.  
 17 "And TekSavvy had no  
 18 involvement in the  
 19 motion." (As read)  
 20 Again, TekSavvy was the  
 21 responding party?  
 22 A. TekSavvy took no position  
 23 on the motion. TekSavvy didn't file any written  
 24 materials on the motion.  
 25 72 Q. My question was, again --

1 and I don't think this is difficult: TekSavvy was  
 2 the responding party on the motion?  
 3 A. TekSavvy -- I would  
 4 consider TekSavvy the responding party who took no  
 5 position and filed no written materials.  
 6 73 Q. All right. And TekSavvy  
 7 spoke to the Court through counsel on June 25 in  
 8 its capacity as responding party. That's fair to  
 9 say?  
 10 A. TekSavvy did speak. You  
 11 stood up and spoke, I remember you speaking.  
 12 74 Q. In their -- in TekSavvy's  
 13 position as responding party. That's what we  
 14 were?  
 15 A. Yeah, that's a legal  
 16 question, I don't have qualms (ph) with that.  
 17 75 Q. And so when you say  
 18 "TekSavvy had no involvement in the motion", that  
 19 doesn't go as far as to say, "TekSavvy didn't  
 20 speak to the Court through counsel in their  
 21 position as Respondent on the motion"?  
 22 A. TekSavvy didn't indicate  
 23 -- beyond taking no position -- what position it  
 24 would take at the motion. We had asked from very  
 25 early on if there was any privacy safeguards, we

1 Aronovitch is engaged in that exercise. So what  
 2 is typically requested and what is typically not,  
 3 I'm sure the Court probably is more familiar than  
 4 either you or I on that, and I'm -- no doubt we  
 5 can leave that for submissions.  
 6 A. Definitely. I mean,  
 7 you're a very experienced counsel.  
 8 79 Q. The submissions that --  
 9 TekSavvy make submissions during the course of  
 10 that hearing?  
 11 A. As I said, I remember you  
 12 being there, I remember you standing up and  
 13 speaking to the matter.  
 14 80 Q. And in particular spoke  
 15 to the terms of the order, what was termed at the  
 16 hearing the "fence posts" that would govern the  
 17 information that was provided to Voltage? Do you  
 18 recall?  
 19 A. I would have to  
 20 paraphrase. TekSavvy didn't oppose the motion,  
 21 but I remember you standing up and making  
 22 submissions that appeared to me to be designed to  
 23 undermine Voltage's position that Voltage was  
 24 entitled to the order. And Voltage ultimately  
 25 received the order. Prothonotary Aalto asked all

1 would be willing to work with TekSavvy. TekSavvy  
 2 never got back to us on that. TekSavvy didn't  
 3 file a factum or any cases.  
 4 As the motion progressed,  
 5 counsel for TekSavvy stood up and said, "We would  
 6 like to say a few things", and the Court allowed  
 7 TekSavvy's counsel to do that.  
 8 76 Q. Mm-hmm. And if TekSavvy  
 9 had, for example, filed a factum, filed written  
 10 argument, cases, affidavits, it would have cost  
 11 TekSavvy more money in terms of legal costs.  
 12 That's fair to say, you would expect?  
 13 A. Legal work tends to  
 14 result in legal costs.  
 15 77 Q. There you go.  
 16 A. I wouldn't expect  
 17 TekSavvy to do that without taking a position on  
 18 the motion, and TekSavvy didn't take a position on  
 19 the motion, and typically parties that don't take  
 20 positions don't seek costs.  
 21 78 Q. Okay. Voltage had given  
 22 an undertaking to pay the cost, and in this case  
 23 has been ordered to pay the reasonable  
 24 administrative and legal costs. You and I aren't  
 25 going to argue about that. Prothonotary

1 parties to deal with this issue of fence posts,  
 2 and I think both CIPPIC and Mr. Zibarras and  
 3 yourself made -- spoke to that. But there were no  
 4 written submissions from TekSavvy regarding the  
 5 fence posts. And my understanding of Prothonotary  
 6 Aalto's order is that -- if we'll call them "fence  
 7 posts", what ended up being in there resulted from  
 8 the cases that were before Prothonotary Aalto,  
 9 that were relied on by Voltage and CIPPIC.  
 10 81 Q. So to the extent that you  
 11 say we were looking to undermine, you -- certainly  
 12 your conclusion was that we weren't making any  
 13 material submissions?  
 14 A. That's -- that's my  
 15 evidence.  
 16 82 Q. Okay. So to the extent  
 17 that Prothonotary Aalto referred to them as  
 18 "helpful submissions", that's his view. Your view  
 19 is that they weren't material?  
 20 A. I think Prothonotary  
 21 Aalto's decision speaks for itself. My  
 22 recollection is that he found the -- when you were  
 23 speaking to just the issue of correlating the IP  
 24 addresses, and providing notice earlier, that  
 25 that's what he found to be helpful.

1 83 Q. Well, we're not reading  
2 -- as you say, the decision speaks for itself on  
3 that issue, and we can point the Court to it.  
4 You're saying that in your view the submissions  
5 were not material?  
6 A. No, because TekSavvy  
7 didn't take a position, didn't conduct any  
8 cross-examinations, even though it attended,  
9 didn't file any written materials. And if  
10 TekSavvy is seeking credit for the fence posts, it  
11 bewilders me that they didn't talk to us earlier  
12 regarding coming to an agreement on that, because  
13 the initial correspondence dealt with that issue,  
14 that TekSavvy said they're concerned with some  
15 safeguards. And our response was that "We will  
16 definitely work with TekSavvy on that, what do you  
17 have in mind", and TekSavvy never followed up in  
18 writing or otherwise.  
19 84 Q. We didn't ask you for a  
20 copy of a draft order on a couple of occasions?  
21 A. TekSavvy did ask for a  
22 copy of a draft order.  
23 85 Q. And you agree that  
24 Voltage did not provide a draft order at anytime  
25 prior to the June 25 motion? You'll agree with

1 that?  
2 A. Well, it wasn't exactly a  
3 mystery as to what these draft orders would  
4 entail. The --  
5 86 Q. I'm not asking whether it  
6 was a mystery --  
7 A. We were just seeking the  
8 contact information of the people associated with  
9 the IP addresses.  
10 87 Q. I'm not asking --  
11 A. That was clear, that was  
12 there.  
13 88 Q. Sorry. Go ahead, I don't  
14 want to interrupt.  
15 A. We shouldn't both be  
16 speaking at the same time.  
17 89 Q. No, exactly, that's why I  
18 didn't interrupt. Sorry, I'm not asking whether  
19 it was a mystery, I was asking whether you agreed  
20 that Voltage did not provide a draft order at  
21 anytime prior to the June 25 motion.  
22 A. Voltage didn't provide a  
23 copy of a draft order, and TekSavvy never  
24 responded to Voltage's request as to what TekSavvy  
25 would like that draft order to look like, as to

1 what terms they would want in there. There was no  
2 notice or opportunity to work cooperatively  
3 despite the representations made by Voltage to do  
4 so.  
5 90 Q. So you say that the  
6 request -- your view then is that the request to  
7 provide a draft order and work from there was not  
8 any form of engagement on that issue?  
9 A. I didn't see it as a form  
10 of engagement. No, as the matter progressed, it  
11 seemed that TekSavvy, while legally not trying --  
12 while legally taking no position, was taking  
13 actions designed to undermine Voltage getting the  
14 order, and was primarily, in my view, from what I  
15 observed, put a marketing campaign to appease  
16 TekSavvy's customers that what -- it was concerned  
17 to be some sort of negative fallout.  
18 91 Q. So your -- anyway, I  
19 won't get into what your opinion may be as to how  
20 TekSavvy runs its business in response to a motion  
21 like this, because I don't think you're either  
22 qualified to or you intend to give opinion  
23 evidence as to what is appropriate or not an  
24 appropriate response to an action like this for an  
25 ISP. So I won't get into that.

1 A. Okay.  
2 92 Q. I'm trying to get into  
3 the factual questions. And the factual question  
4 that I asked was that you didn't provide a draft  
5 order, and I think you answered, "Yes, you didn't  
6 provide a draft order." So there's no dispute on  
7 that subject. That's fair to say?  
8 A. I was giving the context.  
9 MR. MCHAFFIE: All right.  
10 Thank you very much. Those are the questions that  
11 I have.  
12 MR. ZIBARRAS: No questions  
13 from me. Thank you very much.  
14 --- Whereupon the examination concluded at  
15 4:52 p.m.  
16  
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Federal Court



Cour fédérale

Date: 20140220

Docket: T-2058-12

Citation: 2014 FC 161

Toronto, Ontario, February 20, 2014

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

VOLTAGE PICTURES LLC

Plaintiff

and

JOHN DOE AND JANE DOE

Defendants

**REASONS FOR ORDER AND ORDER**

“... the rise of so-called ‘copyright trolls’ – plaintiffs who file multitudes of lawsuits solely to extort quick settlements – requires courts to ensure that the litigation process and their scarce resources are not being abused.”<sup>1</sup>

**INTRODUCTION**

[1] Do persons who download copyrighted material from the internet using a peer to peer (P2P) network and the BitTorrent Protocol (BitTorrent) through the auspices of an Internet Service Provider (ISP) have a right to privacy such that their contact information not be revealed to the party whose copyright is being infringed? If they are infringing copyright what remedy, if any, should the

Court impose? These are the questions at issue on this motion. While at first blush the answer may seem simple enough, in reality given the issues in play the answers require a delicate balancing of privacy rights versus the rights of copyright holders. This is especially so in the context of modern day technology and users of the internet.

[2] In essence, in this proceeding the Plaintiff (Voltage) seeks the names and addresses of some 2,000 subscribers (Subscribers) of an ISP known TekSavvy Solutions Inc. This type of order is often referred to as a *Norwich*<sup>2</sup> Order – a litigation tool requiring non-parties to a litigation to be subject to discovery or being compelled to provide information.

[3] Voltage seeks the names and addresses so that they can pursue litigation against the Subscribers for the unauthorized copying and distribution of Voltage's copyrighted cinematographic works (Works). The case engages provisions of the *Copyright Act*, RSC, 1985, c C-42 and the *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5 (PIPEDA).

[4] Pursuant to an order of this Court, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) was granted leave to intervene on this motion in order to enhance the record and provide arguments and evidence to assist the Court in determining the issue and to put the position of the Subscribers and Voltage in an appropriate context. To that end, CIPPIC filed evidence by way of affidavit and cross-examined the main deponent who gave evidence on behalf

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<sup>1</sup> Judge Ronald Guzman, *TCYK, LLC v. Does 1 – 88*, 2013 U.S. Dist LEXIS 88402, (U.S. District Court for the Northern District of Illinois) p. 3.

<sup>2</sup> *Norwich Pharmacal Co. v. Customs & Excise Commissioners*, [1974] AC 133. This type of order first came to light in this case. These types of orders are now part of the Canadian litigation landscape and require innocent third parties to disclose information in their possession regarding unlawful conduct. A discussion of these orders is found later in these reasons.

of Voltage. CIPPIC also filed extensive written representations. TekSavvy, the ISP took no position on the motion.

[5] CIPPIC has raised a number of objections to Voltage's motion. It argues that privacy considerations and broader interests of justice should prevail in the particular circumstances of this case.

[6] Specifically, CIPPIC alleges that Voltage's true intentions are not motivated by any rights it may hold under the *Copyright Act*, RSC 1985, c C-42. CIPPIC characterizes Voltage and Canipre Inc. (Canipre) the forensic investigation company retained by Voltage to track the names of the Subscribers as "copyright trolls" engaged in "speculative invoicing" which seeks to intimidate individuals into easy settlements by way of demand letters and threats of litigation. It is alleged that the cost and the uncertainty or stigma of litigation coerces most individuals into making payments, whether or not they were involved in the unauthorized copying and distribution of films on the internet. The Court is cautioned not to become an inadvertent tool assisting parties in this type of business model.

### **FACTS**

[7] Extensive affidavit evidence was filed on the motion as well as extensive case briefs. Voltage filed the affidavit of Barry Logan (Logan Affidavit) the owner and principal forensic consultant of Canipre. Voltage also filed two affidavits of John Philpott (Philpott Affidavits), an associate with the law firm representing Voltage which attached the affidavit of Michael Wickstrom of Voltage and the affidavit of Mathias Gartner, an information technology expert. CIPPIC also

filed evidence in the form of an affidavit of Timothy Lethbridge (Lethbridge Affidavit) which also dealt with technical issues relating to the internet. CIPPIC also filed the affidavit of Alexander Cooke (Cooke Affidavit), a law student who conducted searches to locate file-sharing lawsuits commenced by Voltage.

[8] Voltage sought to strike the Lethbridge Affidavit on the grounds that the witness had no direct knowledge of the matters in issue and was not an expert on the areas on which he opined. Voltage pointed to lengthy sections of the cross-examination to demonstrate that Mr. Lethbridge lacked expertise on issues relating to the case and the use of BitTorrent. However, in the end result, the Lethbridge Affidavit should be accepted subject to the qualifications advanced by Voltage.

[9] Voltage is a film production company which among other films produced the Oscar nominated film *The Hurt Locker*. The second of the Philpott Affidavits provides evidence both directly and indirectly through the Michael Wickstrom affidavit that Voltage in fact owns copyright in the Works.

[10] In 2012 Voltage retained Canipre to investigate whether any of Voltage's cinematographic works (Works) were being copied and distributed in Canada over P2P networks using BitTorrent.

[11] Apparently, BitTorrent is a P2P file sharing protocol that facilitates the distribution of large amounts of data over the internet. The non-party TekSavvy is an ISP based in Canada which provides its customers with access to the internet.

[12] There appears to be little dispute about how the technology works. When a file is uploaded to a BitTorrent network that is referred to as "seeding". Other P2P network users, called "peers", can then connect to the user seeding the file. BitTorrent breaks a file into numerous small data packets, each of which is identifiable by a unique hash number created using a hash algorithm. Once the file is broken into packets other peers are able to download different sections of the same file from different users. Each new peer is directed to the most readily available packet they wish to download. Peers copy files from multiple users who may have the file available on the BitTorrent network. The peer then becomes a seeder as the data packet is distributed to other peers connected to the BitTorrent network. Once a packet is downloaded it is then available to other users who are also connected to the BitTorrent network.

[13] Voltage retained the services of Canipre to conduct a forensic investigation of the Works that had been downloaded from BitTorrent networks. The software used by Canipre was able to identify the IP address of each seeder and peer who offered any of the Works for transfer or distribution. This software was able to identify the IP address of the user; the date and time the file was distributed; the P2P network used; and, the file's metadata including the name of the file and its size (collectively the File Data).

[14] The File Data was reviewed and transactions were isolated geographically to Ontario and to TekSavvy customers. This forensic investigation has resulted in some 2000 Subscribers being identified by their unique IP address assigned to them by TekSavvy.

[15] CIPPIC, in its evidence, qualifies the extent to which useful information can necessarily be obtained from the ISP. That is, IP addresses do not necessarily result in obtaining the person who may have engaged in downloading the Works. For example, on an open non-password protected WiFi network, any stranger could use a BitTorrent client to download connect. This frequently happens at internet cafes and the like. Thus, the particular infringer may not be able to be identified.

[16] Voltage has had a history in the U.S. of commencing file-sharing lawsuits such as this. According to the Cooke Affidavit there are 22 file-sharing lawsuits in the American Federal Court system where Voltage is listed as a Plaintiff. The majority involve unknown alleged infringers. The total number of unknown alleged infringers is in the range of 28,000.

#### **POSITIONS OF THE PARTIES TO THE MOTION**

[17] As there is no "real" Defendant in this proceeding other than the named John Doe and Jane Doe, there was no party which could oppose this motion. Thus, CIPPIC sought intervener status which was granted which argued against making the order requested by Voltage.

#### **Position of Voltage**

[18] Voltage's position on this motion is relatively straightforward. That is, the identified Subscribers have infringed the copyright of Voltage by downloading or distributing the Works and are therefore *prima facie* liable under the *Copyright Act* for infringement. Thus, TekSavvy should be ordered to produce the contact information for the Subscribers who are all potential Defendants to this action.

[19] Relying primarily upon *BMG Canada Inc. v Doe*, 2005 FCA 193 (*BMG*) (discussed in greater detail below) Voltage argues that it has met all of the principles enunciated in *BMG* and TekSavvy should be ordered to release the information on the Subscribers. It is to be noted as well that the position of Voltage was that it fully intends to pursue claims against the Subscribers.

#### **Position of CIPPIC**

[20] The position of CIPPIC is that no information should be released by TekSavvy, as this will infringe the rights of privacy rights of the Subscribers and may affect the scope of protection offered to anonymous online activity.

[21] They argue that there are important public policy issues involving the intersection of law and technology which require careful consideration and balancing by the Court before ordering third parties to reveal private information. They argue that this type of request of the Court may extend beyond mere infringers to require information about whistle-blowers and confidential sources of documents leaked in the public interest.

[22] To that end, CIPPIC argues that the right to privacy is implicitly a protected right under sections 7 and 8 of the *Charter of Rights and Freedoms*. Thus, it is argued, the Court should not readily compel innocent third parties to divulge information which breaches the privacy expectations of individuals and which, in a rapidly changing technological environment, may not provide the real information relating to the unlawful conduct.

[23] CIPPIC points to the jurisprudence evolving in other jurisdictions, particularly the U.S. and United Kingdom, to argue that Canadian Courts should not be quick to issue this kind of order without first considering the real objective of the party seeking the information.

[24] CIPPIC argues that this type of litigation is, in fact, merely a business model to coerce payments from individuals who do not wish to incur the cost of defending a lawsuit and would rather pay something to an entity such as Voltage than pay lawyers. This type of business approach has been the subject of discussion in those other jurisdictions (discussed in greater detail below). Therefore, the Court should not be an unwitting tool of “copyright trolls”.

[25] However, it must be noted that on this motion, that whether Voltage is or is not a “copyright troll” in pursuing information from TekSavvy is not for determination. The only issue is whether the test for granting a *Norwich* order has been met in accordance with the jurisprudence.

#### Relevant Legislation

[26] Before embarking on a consideration of the issues raised by the parties it is useful to set out the relevant legislation and rules which are engaged in this motion.

[27] First, Rule 238 of the *Federal Courts Rules* provides for granting leave to examine non-parties to an action. It reads as follows:

*Examination of non-parties  
with leave*

238. (1) A party to an action

*Interrogatoire d'un tiers*

238. (1) Une partie à une action

may bring a motion for leave to examine for discovery any person not a party to the action, other than an expert witness for a party, who might have information on an issue in the action.

*Personal service on non-party*

(2) On a motion under subsection (1), the notice of motion shall be served on the other parties and personally served on the person to be examined.

*Where Court may grant leave*

(3) The Court may, on a motion under subsection (1), grant leave to examine a person and determine the time and manner of conducting the examination, if it is satisfied that

- (a) the person may have information on an issue in the action;
- (b) the party has been unable to obtain the information informally from the person or from another source by any other reasonable means;
- (c) it would be unfair not to allow the party an opportunity to question the person before trial; and
- (d) the questioning will not cause undue delay, inconvenience or expense to the

peut, par voie de requête, demander l'autorisation de procéder à l'interrogatoire préalable d'une personne qui n'est pas une partie, autre qu'un témoin expert d'une partie, qui pourrait posséder des renseignements sur une question litigieuse soulevée dans l'action.

*Signification de l'avis de requête*

(2) L'avis de la requête visée au paragraphe (1) est signifié aux autres parties et, par voie de signification à personne, à la personne que la partie se propose d'interroger.

*Signification de l'avis de requête*

(3) Par suite de la requête visée au paragraphe (1), la Cour peut autoriser la partie à interroger une personne et fixer la date et l'heure de l'interrogatoire et la façon de procéder, si elle est convaincue, à la fois :

- a) que la personne peut posséder des renseignements sur une question litigieuse soulevée dans l'action;
- b) que la partie n'a pu obtenir ces renseignements de la personne de façon informelle ou d'une autre source par des moyens raisonnables;

person or to the other parties.

c) qu'il serait injuste de ne pas permettre à la partie d'interroger la personne avant l'instruction;

d) que l'interrogatoire n'occasionnera pas de retards, d'inconvénients ou de frais déraisonnables à la personne ou aux autres parties.

[28] As discussed below, Rule 238(3) is very much aligned with the principles set out in *BMG*.

[29] The two statutes engaged are the *Copyright Act* and *PIPEDA*. The relevant sections referred to by the parties to this motion are as follows:

*Copyright Act, R.S.C, 1985, c C-42*

*Liability for infringement*

35. (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

*Proof of profits*

(2) In proving profits,  
(a) the plaintiff shall be required

*Violation du droit d'auteur : responsabilité*

35. (1) Quiconque viole le droit d'auteur est passible de payer, au titulaire du droit qui a été violé, des dommages-intérêts et, en sus, la proportion, que le tribunal peut juger équitable, des profits qu'il a réalisés en commettant cette violation et qui n'ont pas été pris en compte pour la fixation des dommages-intérêts.

*Détermination des profits*

(2) Dans la détermination des profits, le demandeur n'est tenu d'établir que ceux provenant de la violation et le défendeur doit

to prove only receipts or revenues derived from the infringement; and

(b) the defendant shall be required to prove every element of cost that the defendant claims.

R.S., 1985, c. C-42, s. 35; 1997, c. 24, s. 20.

#### *Statutory damages*

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

(a) in a sum of not less than \$500 and not more than \$20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and

(b) in a sum of not less than \$100 and not more than \$5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes.

prouver chaque élément du coût qu'il allègue.

L.R. (1985), ch. C-42, art. 35; 1997, ch. 24, art. 20.

#### *Dommmages-intérêts préétablis*

38.1 (1) Sous réserve des autres dispositions du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), les dommages-intérêts préétablis ci-après pour les violations reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables:

a) dans le cas des violations commises à des fins commerciales, pour toutes les violations — relatives à une oeuvre donnée ou à un autre objet donné du droit d'auteur —, des dommages-intérêts dont le montant, d'au moins 500 \$ et d'au plus 20 000 \$, est déterminé selon ce que le tribunal estime équitable en l'occurrence;

b) dans le cas des violations commises à des fins non commerciales, pour toutes les violations — relatives à toutes les oeuvres données ou tous les autres objets donnés du droit d'auteur —, des dommages-intérêts, d'au moins 100 \$ et d'au plus 5000 \$, dont le montant est déterminé selon ce

*Infringement of subsection  
27(2.3)*

(1.1) An infringement under subsection 27(2.3) may give rise to an award of statutory damages with respect to a work or other subject-matter only if the copyright in that work or other subject-matter was actually infringed as a result of the use of a service referred to in that subsection.

*Deeming — infringement of  
subsection 27(2.3)*

(1.11) For the purpose of subsection (1), an infringement under subsection 27(2.3) is deemed to be for a commercial purpose.

*Infringements not involved in  
proceedings*

(1.12) If the copyright owner has made an election under subsection (1) with respect to a defendant's infringements that are for non-commercial purposes, they are barred from recovering statutory damages under this section from that defendant with respect to any other of the defendant's infringements that were done for non-commercial purposes before the institution of the proceedings in which the election was made.

que le tribunal estime équitable en l'occurrence.

*Violation du paragraphe  
27(2.3)*

(1.1) La violation visée au paragraphe 27(2.3) ne peut donner droit à l'octroi de dommages-intérêts préétablis à l'égard d'une oeuvre donnée ou à un autre objet donné du droit d'auteur que si le droit d'auteur de l'une ou de l'autre a été violé par suite de l'utilisation des services mentionnés à ce paragraphe.

*Violation réputée: paragraphe  
27(2.3)*

(1.11) Pour l'application du paragraphe (1), la violation du droit d'auteur visée au paragraphe 27(2.3) est réputée être commise à des fins commerciales.

*Réserve*

(1.12) Toutefois, le titulaire du droit d'auteur qui a choisi de recouvrer des dommages-intérêts préétablis auprès de la personne visée au paragraphe (1) pour des violations qu'elle a commises à des fins non commerciales ne pourra pas recouvrer auprès d'elle de tels dommages-intérêts au titre du présent article pour les violations commises à ces fins avant la date de l'introduction

*No other statutory damages*

(1.2) If a copyright owner has made an election under subsection (1) with respect to a defendant's infringements that are for non-commercial purposes, every other copyright owner is barred from electing to recover statutory damages under this section in respect of that defendant for any of the defendant's infringements that were done for non-commercial purposes before the institution of the proceedings in which the election was made.

*If defendant unaware of infringement*

(2) If a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award under paragraph (1)(a) to less than \$500, but not less than \$200.

*Special case*

(3) In awarding statutory damages under paragraph (1)(a) or subsection (2), the court may award, with respect to each work or other subject-matter, a lower amount than \$500 or \$200, as the case may be, that the court considers just, if

de l'instance et qu'il ne lui a pas reprochées dans le cadre de celle-ci.

*Réserve*

(1.2) Si un titulaire du droit d'auteur a choisi de recouvrer des dommages-intérêts préétablis auprès de la personne visée au paragraphe (1) pour des violations qu'elle a commises à des fins non commerciales, aucun autre titulaire du droit d'auteur ne pourra recouvrer auprès d'elle de tels dommages-intérêts au titre du présent article pour les violations commises à ces fins avant la date de l'introduction de l'instance.

*Cas particuliers*

(2) Dans les cas où le défendeur convainc le tribunal qu'il ne savait pas et n'avait aucun motif raisonnable de croire qu'il avait violé le droit d'auteur, le tribunal peut réduire le montant des dommages-intérêts visés à l'alinéa (1)a) jusqu'à 200 \$.

*Cas particuliers*

(3) Dans les cas où plus d'une oeuvre ou d'un autre objet du droit d'auteur sont incorporés dans un même support matériel ou dans le cas où seule la violation visée au paragraphe 27(2.3) donne ouverture aux dommages-intérêts préétablis,

- (a) either
- (i) there is more than one work or other subject-matter in a single medium, or
  - (ii) the award relates only to one or more infringements under subsection 27(2.3); and

(b) the awarding of even the minimum amount referred to in that paragraph or that subsection would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement.

#### *Collective societies*

(4) Where the defendant has not paid applicable royalties, a collective society referred to in section 67 may only make an election under this section to recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just.

#### *Factors to consider*

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

(a) the good faith or bad faith of the defendant;

le tribunal peut, selon ce qu'il estime équitable en l'occurrence, réduire, à l'égard de chaque oeuvre ou autre objet du droit d'auteur, le montant minimal visé à l'alinéa (1)a) ou au paragraphe (2), selon le cas, s'il est d'avis que même s'il accordait le montant minimal de dommages-intérêts préétablis le montant total de ces dommages-intérêts serait extrêmement disproportionné à la violation.

#### *Société de gestion*

(4) Si le défendeur n'a pas payé les redevances applicables en l'espèce, la société de gestion visée à l'article 67 — au lieu de se prévaloir de tout autre recours en vue d'obtenir un redressement pécuniaire prévu par la présente loi — ne peut, aux termes du présent article, que choisir de recouvrer des dommages-intérêts préétablis dont le montant, de trois à dix fois le montant de ces redevances, est déterminé selon ce que le tribunal estime équitable en l'occurrence.

#### *Facteurs*

(5) Lorsqu'il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants :

a) la bonne ou mauvaise foi du défendeur;

(b) the conduct of the parties before and during the proceedings;

(c) the need to deter other infringements of the copyright in question; and

(d) in the case of infringements for non-commercial purposes, the need for an award to be proportionate to the infringements, in consideration of the hardship the award may cause to the defendant, whether the infringement was for private purposes or not, and the impact of the infringements on the plaintiff.

*No award*

(6) No statutory damages may be awarded against

(a) an educational institution or a person acting under its authority that has committed an act referred to in section 29.6 or 29.7 and has not paid any royalties or complied with any terms and conditions fixed under this Act in relation to the commission of the act;

(b) an educational institution, library, archive or museum that is sued in the circumstances referred to in section 38.2;

(c) a person who infringes copyright under paragraph 27(2)(e) or section 27.1, where the copy in question was made with the consent of the

b) le comportement des parties avant l'instance et au cours de celle-ci;

c) la nécessité de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur en question;

d) dans le cas d'une violation qui est commise à des fins non commerciales, la nécessité d'octroyer des dommages-intérêts dont le montant soit proportionnel à la violation et tienne compte des difficultés qui en résulteront pour le défendeur, du fait que la violation a été commise à des fins privées ou non et de son effet sur le demandeur.

*Cas où les dommages-intérêts préétablis ne peuvent être accordés*

(6) Ne peuvent être condamnés aux dommages-intérêts préétablis :

a) l'établissement d'enseignement ou la personne agissant sous l'autorité de celui-ci qui a fait les actes visés aux articles 29.6 ou 29.7 sans acquitter les redevances ou sans observer les modalités afférentes fixées sous le régime de la présente loi;

b) l'établissement d'enseignement, la bibliothèque, le musée ou le service d'archives, selon le cas, qui est poursuivi dans les

copyright owner in the country where the copy was made; or

circonstances prévues à l'article 38.2;

(d) an educational institution that is sued in the circumstances referred to in subsection 30.02(7) or a person acting under its authority who is sued in the circumstances referred to in subsection 30.02(8).

c) la personne qui commet la violation visée à l'alinéa 27(2)e) ou à l'article 27.1 dans les cas où la reproduction en cause a été faite avec le consentement du titulaire du droit d'auteur dans le pays de production;

*Exemplary or punitive damages not affected*

d) l'établissement d'enseignement qui est poursuivi dans les circonstances prévues au paragraphe 30.02(7) et la personne agissant sous son autorité qui est poursuivie dans les circonstances prévues au paragraphe 30.02(8).

(7) An election under subsection (1) does not affect any right that the copyright owner may have to exemplary or punitive damages.

*Domages-intérêts exemplaires*

(7) Le choix fait par le demandeur en vertu du paragraphe (1) n'a pas pour effet de supprimer le droit de celui-ci, le cas échéant, à des dommages-intérêts exemplaires ou punitifs.

[30] These sections of the *Copyright Act* provide a complete code for the recovery of damages for copyright infringement. Voltage argues that it has demonstrated a *bona fide* case of infringement and is entitled to pursue the alleged infringers for damages in accordance with these sections of the *Copyright Act*.

[31] The relevant sections of *PIPEDA* are as follows:

***Personal Information Protection and Electronic Documents Act (SC 2000, c 5)****Disclosure without knowledge or consent*

7. (3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

[...]

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

[...]

(i) required by law.

[...]

*Disclosure without consent*

(5) Despite clause 4.5 of Schedule 1, an organization may disclose personal information for purposes other than those for which it was collected in any of the circumstances set out in paragraphs (3)(a) to (h.2).

*Communication à l'insu de l'intéressé et sans son consentement*

7. (3) Pour l'application de l'article 4.3 de l'annexe 1 et malgré la note afférente, l'organisation ne peut communiquer de renseignement personnel à l'insu de l'intéressé et sans son consentement que dans les cas suivants:

[...]

c) elle est exigée par assignation, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de documents;

[...]

i) elle est exigée par la loi.

[...]

*Communication sans le consentement de l'intéressé*

(5) Malgré l'article 4.5 de l'annexe 1, l'organisation peut, dans les cas visés aux alinéas (3)a) à h.2), communiquer un renseignement personnel à des fins autres que celles auxquelles il a été recueilli.

[32] CIPPIC relies on these sections of *PIPEDA* to argue that the Court should weigh carefully releasing any information about the Subscribers. Such information can be released by TekSavvy if “required by law”.

### ISSUES

[33] Should an order be made granting Voltage the right to examine TekSavvy as a non-party to the litigation in order to obtain contact information of the Subscribers?

[34] If such an order is made what protections should be built into the order to protect or minimize the invasion of the privacy interests of internet users?

[35] As noted briefly above and discussed more fully below, there are important competing policy considerations as to whether the *Norwich* Order should be granted in this kind of situation. 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.

### ANALYSIS

[36] There is developing jurisprudence in Canada and in this Court dealing with *Norwich* Orders. The leading case in Canada is *BMG*, and the Court of Appeal for Ontario recently waded into this area in *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184. A consideration of these cases must

be conducted to determine whether the threshold facts demonstrate that Voltage is entitled to the order requested.

**Bona Fide v Prima Facie Standard in Canada**

[37] In *BMG*, the Honourable Justice Edgar Sexton on behalf of the Federal Court of Appeal addressed the tension between the privacy rights of internet users and copyright holders in the context of illegal downloading and sharing of music.

[38] The Court determined that the legal principles which apply to the equitable bill of discovery apply to the test that a plaintiff must satisfy under Rule 238 of the *Federal Courts Rules*. An order is warranted where a plaintiff has a *bona fide* claim and meets the criteria of Rule 238.

[39] *BMG* provides a framework for consideration of the issues on this motion. The observations of the Court on the requirement of a *bona fide* claim have been put in issue by CIPPIC. In *BMG* it was held that a *bona fide* standard was preferable to the higher standard of a *prima facie* case because the burden of establishing the higher standard would have the effect of stripping the plaintiffs of a remedy. Justice Sexton noted the difficulty of requiring a plaintiff to establish copyright infringement when it has neither the identity of the person they wish to sue nor the details of what was allegedly done by that person.

[40] According to the Court, establishing a *bona fide* claim requires a plaintiff to show: 1) that they really do intend to bring an action for infringement of copyright based upon the information

they obtain, and 2) that there is no other improper purpose for seeking the identity of these persons.

The Court said this at para. 34:

In my view, it would make little sense to require proof of a *prima facie* case at the stage of the present proceeding. The plaintiffs do not know the identity of the persons they wish to sue, let alone the details of precisely what was done by each of them such as to actually prove infringement. Such facts would only be established after examination for discovery and trial. **The plaintiffs would be effectively stripped of a remedy if the Courts were to impose upon them, at this stage, the burden of showing a *prima facie* case. It is sufficient if they show a *bona fide* claim, 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.** (emphasis added)

[41] With respect to the balancing of competing interests, Justice Sexton identified the privacy interest raised by the case as "an important consideration" and noted that the balance between privacy interest and public interest are in play where confidential information is sought to be revealed. The Court made the following observations:

#### Privacy Issues

[36] I agree with the Motion Judge's characterization of the 5<sup>th</sup> criteria - that is - the public interest in favour of disclosure must outweigh the legitimate privacy concerns of the person sought to be identified if a disclosure order is made.

[37] All respondents raise the privacy issue. It is an important consideration. Pursuant to PIPEDA, ISPs are not entitled to "voluntarily" disclose personal information such as the identities requested except with the customer's consent or pursuant to a court order. Indeed, pursuant to subsections 7(3)(c), 8(8) and 28 of PIPEDA, any organization that receives a request for the release of personal information must "retain the information for as long as is necessary to allow the individual to exhaust any recourse" under PIPEDA. Failure to comply could result in the organization being found guilty of an offence punishable on summary conviction or an indictable offence.

[39] The delicate balance between privacy interests and public interest has always been a concern of the court where confidential information is sought to be revealed. Although PIPEDA had not been enacted at the time of the *Glaxo* decision, Stone J.A. nonetheless noted at paragraph 62:

I am not persuaded that this is a sufficient justification for refusing to disclose the identity of the importers in the present case. While section 107 implies that information collected pursuant to the Act will be treated as confidential, section 108 indicates that it is susceptible to disclosure in certain situations. I am thus doubtful that importers have a high expectation of confidentiality regarding the information which they furnish to customs officials. More important, I am sceptical about the expectation and degree of confidentiality associated with the nature of the information which the appellant seeks. As the House of Lords observed in *Norwich Pharmacal, supra*, the names of the importers are likely to pass through many hands before reaching those of customs officials. It is therefore not reasonable to regard the identity of the importers as particularly sensitive information. In my opinion, in the circumstances of this case the public interest in ensuring that the appellant is able to pursue in the courts those who have allegedly violated its patent rights outweighs the public interest in maintaining the confidentiality of the importers' names.

He also approved, at paragraph 26, of the statement of Viscount Dilhorne in *Norwich* as follows:

Subject to the public interest in protecting the confidentiality of information given to Customs, in my opinion it is clearly in the public interest and right for protection of patent holders, where the validity of the patent is accepted and the infringement of it not disputed, that they should be able to obtain by discovery the names and addresses of the wrongdoers from someone involved but not a party to the wrongdoing.

[40] The reasoning in *Glaxo* and *Norwich* is compelling. Intellectual property laws originated in order to protect the promulgation of ideas. Copyright law provides incentives for innovators - artists, musicians, inventors, writers, performers and marketers - to create. It is designed to ensure that ideas are

expressed and developed instead of remaining dormant. Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished.

[41] Modern technology such as the Internet has provided extraordinary benefits for society, which include faster and more efficient means of communication to wider audiences. **This technology must not be allowed to obliterate those personal property rights which society has deemed important. Although privacy concerns must also be considered, it seems to me that they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights.** (emphasis added)

[42] In these passages the Court viewed the conflict as one between privacy interests and “public interest” or “public concerns”. In order to protect those privacy interests the Court went on at paragraphs 42 to 45 to observe that courts granting disclosure may wish to give specific direction as to the type of information to be disclosed and the manner in which it can be used. The option of a confidentiality order was also referenced. The Court stated:

[42] Thus, in my view, in cases where plaintiffs show that they have a *bona fide* claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action. However, caution must be exercised by the courts in ordering such disclosure, to make sure that privacy rights are invaded in the most minimal way.

...

[44] Also, as the intervener, Canadian Internet Policy and Public Interest Clinic, pointed out, plaintiffs should be careful not to extract private information unrelated to copyright infringement, in their investigation. If private information irrelevant to the copyright issues is extracted, and disclosure of the user's identity is made, the recipient of the information may then be in possession of highly confidential information about the user. If this information is unrelated to copyright infringement, this would be an unjustified intrusion into the rights of the user and might well amount to a breach of PIPEDA by the ISPs, leaving them open to prosecution.

Thus in situations where the plaintiffs have failed in their investigation to limit the acquisition of information to the copyright infringement issues, a court might well be justified in declining to grant an order for disclosure of the user's identity.

[45] In any event, if a disclosure order is granted, specific directions should be given as to the type of information disclosed and the manner in which it can be used. 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 makes a confidentiality order.

[43] On this issue of copyright infringement, the Court made these observations:

Infringement of Copyright

[46] As has been mentioned, the Motions Judge made a number of statements relating to what would or would not constitute infringement of copyright. (See para. 15(f)). 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 of infringement.

[47] In my view, conclusions such as these should not have been made in the very preliminary stages 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.

...

[53] The Motions 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." 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. *Copyright Act* subsection 27(2):

[44] 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.

[45] The principles to be taken from *BMG* are as follows:

- a) a plaintiff must have a *bona fide* case;
- b) a non-party, in this case TekSavvy, must have information on an issue in the proceeding;
- c) an order of the Court is the only reasonable means of obtaining the information;
- d) that fairness requires the information be provided prior to trial; and,
- e) any order made will not cause undue delay, inconvenience or expense to the third-party or others.

[46] Voltage argues that it has met all of these factors and therefore is entitled to the remedy it seeks. With respect to a) it argues it has demonstrated a *bona fide* case by virtue of the statement of claim issued in this case together with the results of the forensic investigation identifying IP addresses engaged in the copying of the Works. With respect to b) the IP addresses are known to TekSavvy but not Voltage and therefore TekSavvy is the only reasonable source of the information. With respect to c) TekSavvy will, quite properly, not reveal the information without a court order. With respect to d) Voltage should be allowed to protect its rights and fairness demands that persons who infringe copyright not be shielded from liability by the anonymity of the internet and its protocols. With respect to e) Voltage argues that without a remedy this case is meaningless as the information is not accessible. Those that infringe ought not to do so with impunity, and the Court can set the terms of such access to information. Further, TekSavvy will be reimbursed for its reasonable costs in providing the information.

[47] Voltage argues that support for its position is found in *Voltage Pictures LLC v Jane Doe and John Doe*, 2011 FC 1024, a case which was unopposed and in which Mr. Justice Shore relied on *BMG* to hold that Voltage had a *bona fide* claim against the defendants solely for the reason that it had brought a copyright infringement action against the two Doe defendants. It is not clear what evidence Voltage provided to link the IP addresses to the infringement in that case.

[48] CIPPIC suggests that the use of *Norwich* orders is a new development in Canada and that *BMG* is but one piece of the puzzle relating to the proper balancing of conflicting interests. It asserts that post-*BMG*, courts in Ontario and other jurisdictions have refined the test set out therein so as to “achieve a better balance among the interests of the plaintiffs, the defendants, third parties and justice.” However, I am not persuaded that on the basis of the current jurisprudence that there has been a shift from the *bona fide* standard as established in *BMG* to the higher standard of a *prima facie* case.

[49] Ontario’s Court of Appeal has very recently expressed the same view on the first criteria for a *Norwich* order. In *Stewart*, the Court of Appeal disagreed with the approach endorsed by CIPPIC and set out by the province’s Divisional Court in *Warman v Fournier et al.*, 2010 ONSC 2126 (Ont Div Ct). The Divisional Court had imposed “a more robust” *prima facie* standard because the case engaged a freedom of expression interest. The Court of Appeal in *Stewart* stated that this was inappropriate because step five of the *Norwich* analysis already allows for the balancing of competing interests.

[50] In *Stewart* the granting of disclosure was held to be designed to facilitate access to justice.

Justice Juriensz, speaking for the Court, made the following observations:

[58] What I draw from these authorities is that the threshold for granting disclosure is designed to facilitate access to justice by victims of wrongdoers whose identity is not known. Judicial treatment of the *Norwich* application procedure should reflect its nature as an equitable remedy.

[59] There is no requirement that the applicant show a *prima facie* case. The entire and apparent strength of the applicant's potential action should be weighed together with the other relevant factors.

[60] The lower threshold at step one does not make *Norwich* relief widely available. *Norwich* relief is not available against a mere witness. *Norwich* relief is only available, as Lord Reid explained in *Norwich*, at p. 175 A.C., against a person who is "mixed up in the tortious acts of others so as to facilitate their wrongdoing" even though this is "through no fault of his own". Most significantly, the apparent strength of the applicant's case may be considered in applying the other factors.

[51] The *bona fide* standard therefore does not mean that relief is readily available but it is the strength of a plaintiff's case that should be considered in applying the other *Norwich* factors. It should be noted that despite stating that the appellant before the Court had difficulty establishing the elements of an underlying cause of action, the Court found that *bona fides* were established because the appellant was not engaged in "mere fishing" and the proposed action was not frivolous (at para. 75).

[52] CIPPIC argues that the Court in *BMG* did not strike the right balance between the competing interests. However, this argument is difficult to assess when the Court in *BMG* did not actually apply the enumerated principles to the facts of that case. CIPPIC seems simply to be asserting that only a higher standard would strike the appropriate balance.

[53] One commentator has pointed out that courts have repeatedly eschewed the *prima facie* standard for interlocutory measures (Melody Yiu, “A New Prescription for Disclosure: Reformulating the Rules for the Norwich Order” (Spring, 2007) 65 UT Fac L Rev 41). There is even less of a case for applying this standard to a *Norwich* remedy because of its role as a sort of “gatekeeper to the courthouse”. In most other disputes, defeat on an interlocutory matter does not necessarily foreclose access to justice for a wronged party. The article suggests that over-inclusion is preferable to under-inclusion where *Norwich* orders are concerned.

[54] Whether this conclusion needs to be qualified when it involves wide-reaching violations of privacy is debatable. Privacy considerations should not be a shield for wrongdoing and must yield to an injured party’s request for information from non-parties. This should be the case irrespective of the type of right the claimant holds. The protection of intellectual property is *ipso facto* assumed to be worthy of legal protection where a valid cause of action is established (Yiu at p. 17). There is little dispute with the correctness of this assertion. Copyright is a valuable asset which should not be easily defeated by infringers. The difficulty in this case is that it is not clear that the protection of copyright is the sole motivating factor supporting Voltage’s claim in this Court. The import of the evidence in the Cooke Affidavit suggests but does not prove that Voltage may have ulterior motives in commencing this action and may be a copyright troll.

#### **Conclusion on *Prima facie* Case**

[55] In the end result, there is no doubt that *BMG* is binding on this Court. So far, Canadian Courts have not moved to a higher *prima facie* standard. Although the determinative issue in *BMG* proved to be the complete lack of evidence, the Court nevertheless found it necessary to address and

clarify the question of whether the plaintiffs could obtain the disclosure sought pursuant to Rule 238. The determination that a *bona fide* case was sufficient was not *obiter*.

[56] In my view of the evidence on this motion, Voltage has established that it does have a *bona fide* claim as set out in the statement of claim. That *bona fide* claim flows from the allegations in the statement of claim and from the forensic investigation evidence in support of this motion. Voltage has also provided evidence that it in fact holds copyright over the Works alleged to have been infringed. This is all in line with the principles established in *BMG*.

[57] The enforcement of Voltage's rights as a copyright holder outweighs the privacy interests of the affected internet users. However, that is not the end of the matter. As part of making any *Norwich* Order, the Court must ensure that privacy rights are invaded in the most minimal way possible, as discussed in paras. 42 to 45 of *BMG*.

#### **Limitations on a *Norwich* Order**

[58] Having determined that Voltage is entitled to a form of *Norwich* Order, the question becomes what limitations the Court should impose to protect or minimize the privacy risks as it relates to the Subscribers. It is to this issue that CIPPIC's submissions better relate. It is also instructive to consider what the courts in other jurisdictions have done to balance the rights of a copyright holder versus internet user's privacy rights.

[59] Voltage argues that there is no reasonable expectation of privacy risk in using P2P networks as to do so puts private information about the individual into the public domain, and when

individuals use these types of networks they reveal publicly their IP address and the files being copied. Voltage relies upon *R. v Trapp*, 2011 SKCA 143 and *R. v Ward*, 2012 ONCA 660. Voltage's position is that infringers ought not to be able to hide behind a veil of internet anonymity.

[60] This would be an acceptable position but for the spectre raised of the "copyright troll" as it applies to these cases and the mischief that is created by compelling the TekSavvy's of the world to reveal private information about their customers. There is also the very real spectre of flooding the Court with an enormous number of cases involving the Subscribers many of whom may have perfectly good defences to the alleged infringement. Finally, the damages against individual Subscribers even on a generous consideration of the *Copyright Act* damage provisions may be minuscule compared to the cost, time and effort in pursuing a claim against the Subscriber.

[61] CIPPIC has relied upon the experience in other jurisdictions to support its position. The issues raised by the parties have been addressed by courts in both the U.S. and the UK. The UK, in particular, provides a framework for the types of safeguards the court can employ to protect the interests of internet users.

### United Kingdom

[62] The nature of the order sought by Voltage is known in the UK and elsewhere as a *Norwich* Order. This form of relief draws its name from a 1974 House of Lords case involving suspected patent infringement (*Norwich Pharmacal* case) in which the House of Lords reviewed and modified the "equitable bill of discovery" remedy. The old equitable bill of discovery allowed an injured party to bring an action to discover the name of the wrongdoer where necessary to pursue redress.

Under the *Norwich* principle today, parties can seek disclosure of information if that information is required to seek redress for an actionable wrong. UK courts accept that the privacy of internet users may be sacrificed to allow redress to claimants wronged by illegal or tortious activity. However, courts remain concerned with the proportionality of orders in circumstances similar to this case brought by Voltage.

[63] There are three cases from the UK courts which highlight the concerns which *Norwich* Order cases pose as it relates to internet users. One case holds that anonymity of internet users is not an obstacle to disclosure where an actionable wrong exists. Two of the cases discuss the lawfulness of arrangements through which some parties are choosing to target P2P sharing and downloading activities.

[64] As noted by CIPPIC, the modern approach to the *Norwich* remedy was addressed by UK's Supreme Court most recently in *Rugby Football Union v Consolidated Information Services*, [2012] UKSC 55, [2013] 1 All ER 928.

[65] This case involved the resale of rugby tickets on a website operated by the defendant. The claimant Rugby Football Union (RFU) was alone responsible for the issuance of tickets for matches played at its stadium. Because it had a policy of allocating tickets in a way that developed the sport and enhanced its popularity, RFU did not allow ticket prices to be inflated. RFU alleged that arguable wrongs were involved in the advertisement and sale of tickets above face value through the defendant's website. It was not disputed before the Supreme Court that the sale of tickets via the website arguably constituted an actionable wrong. It was held that RFU had no readily available

alternative means of discovering who the possible wrongdoers were other than by means of a *Norwich Order*.

[66] In its reasons, the Supreme Court addressed the principles that should guide *Norwich Orders*. It noted that cases post-*Norwich Pharmacal* have stressed the need for flexibility and discretion in considering whether to grant disclosure. Significantly, the Court confirmed that it is not necessary that an applicant intend to bring legal proceedings in respect of the alleged wrong. Rather, any form of redress, from disciplinary action to a dismissal of an employee, would suffice to ground an application for disclosure pursuant to a *Norwich Order*. In my view, the bringing of proceedings in intellectual property cases is an essential requirement in the sense that there must be an intention to enforce intellectual property rights.

[67] However, the Court concluded that disclosure is to be ordered only if it is a “necessary and proportionate response in all the circumstances”. The Court also held that necessity does not require that the remedy be one of last resort.

[68] While this is a developing area of law, there is also a series of well-known cases brought by Media C.A.T. Ltd. (Media CAT) and lengthy discussion of the mischief which these cases can create. Media CAT alleged copyright infringement in pornographic films by way of P2P sharing software. Media CAT obtained several *Norwich Orders* which resulted in revealing tens of thousands of names and addresses of alleged infringers.

[69] In *Media CAT Ltd v Adams & Ors*, [2011] EWPC 6, Patents County Court Judge Birss addressed a number of concerns raised by Media CAT's conduct following the granting of the *Norwich Order*, but in the context of Media CAT's attempt to discontinue the 27 claims it commenced.

[70] Much of the decision concerns itself with the question of whether Media CAT had standing to bring the claim of copyright infringement, and subsequently, to seek that it be discontinued. Media CAT alleged the right to do so on the basis of its contract with a copyright owner giving it the right to claim and prosecute any person identified as having made available for download films covered by the agreement.

[71] Notwithstanding this narrow point, however, the case is worth reviewing because it illustrates the abuse that can occur when a plaintiff such as Media CAT receives a *Norwich Order* with no safeguards given to the broader context of the rights of the alleged infringers.

[72] Although Judge Birss was not actually sitting in review of the decision to grant the *Norwich Orders*, he addressed the Court's jurisdiction to grant such a remedy. He noted that the orders were granted in this case on the basis of statements from technical experts in support of the infringement claim.

[73] The Court described in some detail the letter writing campaign embarked on by Media CAT's solicitors once the *Norwich Order* was obtained. The campaign involved sending out a "letter of claim" to tens of thousands of individuals. The letter consisted of 6 pages of legal and

technical discussions, three attachments, including the Court's order for disclosure, and an invitation to look at ACS:Law's website for "Notes on evidence". The letter of claim represented Media CAT as a copyright protection society, which it was not, and sought £495 in compensation.

[74] Judge Birss identified a number of misleading statements in the letters and concluded that the impact of the letter on recipients would be significant: "The letter would be understood by many people as a statement that they have been caught infringing copyright in pornographic film, that Media CAT has evidence of precisely that and that a court has already looked into the matter..." (at para 18). In fact, he noted that the court's office had received telephone calls from people in tears on receipt of the letter.

[75] Judge Birss stated that most ordinary members of the public do not appreciate that the *Norwich* Order is not based on a finding of infringement and that people would be tempted to pay out of the desire to avoid embarrassment, whether or not they had done anything wrong.

[76] With respect to the sum sought, the Court remarked that no breakdown of the £495 sum was provided. The Court also wondered how it could be the case that out of the 10,000 letters sent, only 27 recipients, those parties to the claim before him, refused to pay.

[77] The Court concluded that the letters misrepresented Media CAT's standing to bring proceedings, it overstated the merits of its case, and asserted an untested basis for infringement, arising out of "authorized" infringement by others.

[78] The decision then discusses an interesting turn of events that took place days before the Court was to hear Media CAT's case. It appears that ACS:Law came to court offices with 27 notices of discontinuance and represented that following the discontinuance, it would reissue the claims.

[79] The concern that Media CAT and ACS:Law lacked an interest in pressing the claims was expressed as follows (at para 100):

Whether it was intended or not, I cannot imagine a system better designed to create disincentives to test the issues in court. Why take cases to court and test the assertions when one can just write more letters and collect payments from a proportion of the recipients?

[80] Finally, the Court considered whether it could restrain Media CAT from continuing its letter writing campaign. The Court noted that courts retain control over the use of documents and information obtained by the disclosure process and that parties may only use the products of disclosure for purposes of the action in which it was disclosed. From this, the Court reasoned that it had the jurisdiction to regulate the use of the information obtained through a *Norwich* Order. Thus, an order restraining the use of the information disclosed could be nothing more than an order varying the original *Norwich* Order.

[81] This case provides helpful guidance to Courts so that they craft orders that are not open-ended, leaving the party who obtains the order to use it unfairly, or abusively and without restriction.

[82] Another English decision bearing on these issues is the 2012 decision *Golden Eye (International) Ltd. et al v Telefonica UK Limited*, [2012] EWHC 723 (Ch) in which Golden Eye, a licensee of copyrights in pornographic movies, sought a *Norwich* Order in relation to over some 9,000 alleged infringers. The lengthy decision of Justice Arnold also offers guidance on the types of limits that should be placed on the use of *Norwich* Orders. As here, a public interest organization (Consumer Focus), was granted intervener status and represented the interests of the unidentified alleged infringers.

[83] Golden Eye and the other claimants alleged that 9,124 IP addresses had been obtained through the use of a tracking service to determine that subscribers had made available copyright material for P2P copying. Golden Eye sought the names and addresses from the ISP, Telefonica. Telefonica did not object to the order. Telefonica consented to a draft order and a draft letter prepared for distribution to the alleged infringers. The draft order provided that Telefonica was to receive £2.20 for each name and address requested by the claimants and £2,500.00 as security for costs. In addition, a copy of a draft letter which would be sent to the alleged infringers was attached to the draft order.

[84] The draft letter was some three pages in length and was full of legal jargon. It also included a proposed settlement to the alleged infringer in the amount of £700 as compensation.

[85] While several issues were raised in the case, the issue bearing most on the facts of this case relates to whether the claimants were genuinely intending to seek redress. Consumer Focus argued that the division of revenue noted above suggested a money-making endeavor on the part of Golden

Eye. It also claimed that the sum of £700 requested in the draft letter was unsupported and unenforceable.

[86] Consumer Focus further argued that the claimants were equivocal about their willingness to pursue infringement actions. Golden Eye's discontinuance of two of the three claims brought after receiving *Norwich* Orders in similar circumstances was said to suggest a desire to avoid judicial scrutiny. Golden Eye did not explain why these claims were discontinued, nor did it provide information with respect to how many subscribers were identified with respect to those orders and how many letters of claim, if any, were sent out.

[87] However, the Court was satisfied that Golden Eye had a genuine commercial desire to obtain compensation for the infringement of their copyright. With respect to the claimants' pursuit of settlements, the Court noted that it is not a requirement for the grant of a *Norwich* Order that the applicant intend or undertake to bring proceedings against the wrongdoer: "Sending a letter before action with a view to persuading the wrongdoer to agree to pay compensation and to give an undertaking not to infringe in the future is one way of seeking redress. There is no requirement for the intending claimant to commit himself to bringing proceedings if redress cannot be obtained consensually" (at para 109).

[88] Mr. Justice Arnold also said that a claimant faced with multiple infringers is entitled to be selective as to which ones he sues. The cost of litigation may be relevant in making such a decision. He found that the evidence was "sufficiently cogent to establish a good arguable case" had been made out that unlawful file-sharing had occurred.

[89] The Court acknowledged that the monitoring software used to identify the users may misidentify users for a number of technical reasons, including an incorrectly synchronized clock. Non-technical reasons might also lead to an innocent party being identified. However, the existence of these uncertainties was not sufficient to rule that the claimants had not established on the evidence that an arguable case of infringement had occurred for the purpose of granting a *Norwich* order.

[90] The Court also addressed whether the order sought was proportional having regard to the privacy and data protection rights of the intended defendants. It noted that both the claimants' and the alleged infringers' rights are protected by specific articles of the *EU Charter* and the *European Convention on Human Rights*. Striking a balance between those rights required the following approach, set out at paragraph 117 of the decision:

- (i) neither Article as such has precedence over the other;
- (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary;
- (iii) the justifications for interfering with or restricting each right must be taken into account;
- (iv) finally, the proportionality test – or "ultimate balancing test" – must be applied to each.

[91] Ultimately, the Court determined that it was necessary for the information sought to be disclosed to allow the claimants to protect their copyright rights. However, proportionality could still be achieved through the terms of the order granted by the Court.

[92] Noting that the draft order prepared by Golden Eye required it to attach a copy of the Court's order to its letter of claim, the Court stressed that the intended defendants should be spared

unnecessary anxiety and distress and should not be given the wrong impression with respect to the meaning of the order.

[93] With respect to the draft letter, Judge Arnold remarked that although it was not the role of the Court to supervise pre-action correspondence, the circumstances of a case such as this required the court to carefully consider the terms of the draft letter of claim. In coming to this conclusion, the Court considered that this type of order would affect ordinary consumers who may not be guilty of infringement, who may not have access to specialized legal services and who may be embarrassed and may not consider it cost-effective to defend the claim, even if innocent.

[94] Justice Arnold observed that the letter should reflect the following points:

- a) make clear the fact that an order for disclosure has been made does not mean that the court has considered the merits of allegation of infringement against the recipient
- b) the letter acknowledge that the intended defendant may not be the person who was responsible for the infringing acts. This takes into account the multiple reasons why account holders associated with certain IP addresses may not be the actual infringers;
- c) if the letter sets out the consequences to the alleged infringer of a successful claim, it must also acknowledge the consequences to the relevant claimant of an unsuccessful claim;
- d) the response time be reasonable. The letter proposed a response time in 14 days which Justice Arnold deemed unreasonable. The Court considered 28 days to be reasonable; and,

- e) threats to shut down the internet connection were unacceptable. The Court found it unacceptable for the claimant to threaten to make "an application to your ISP to show down or terminate your internet connection."

[95] The claimant's request for £700.00 as compensation was argued to be unsupported and unsupportable. The draft letter made no attempt to explain or justify the sum and Consumer Focus took the position that it was inconceivable that every alleged infringer caused the copyright owners a loss of £700.00.

[96] The Court accepted Consumer Focus's position and noted that as the claimants had no information about the scale of infringement committed by each infringer, the amount claimed was inappropriate. In intellectual property cases in the UK it is usual for claimants to seek disclosure from defendants before electing between inquiry as to damages and an account of profits. The Court therefore instructed as follows regarding quantum:

134. [...] If the Claimants were genuinely interested in seeking accurately to quantify their losses, then it seems to me that they would wish to seek some form of disclosure at least in the first instance. I appreciate that it may not be cost-effective for disclosure to be pursued if the Intended Defendant is unwilling to cooperate, but I do not consider that that justifies demanding an arbitrary figure from all the Intended Defendants in the letter of claim.

[...]

138. Accordingly, I do not consider that the Claimants are justified in sending letters of claim to every Intended Defendant demanding the payment of £700. What the Claimants ought to do is to proceed in the conventional manner, that is to say, to require the Intended Defendants who do not dispute liability to disclose such information as they are able to provide as to the extent to which they have engaged in P2P file sharing of the relevant Claimants' copyright works. In my view it would be acceptable for the Claimants to

indicate that they are prepared to accept a lump sum in settlement of their claims, including the request for disclosure, but not to specify a figure in the initial letter. The settlement sum should be individually negotiated with each Intended Defendant.

[97] Finally, the Court considered but rejected a number of "safeguards" proposed by the intervener. These included notification of the alleged infringers; appointing a supervising solicitor; providing for a group litigation order; and establishing test cases. In all of the circumstances of the cases Justice Arnold did not deem them appropriate at that juncture of the proceedings.

[98] However, an alternative safeguard was proposed by Judge Arnold and accepted by the claimants. He placed a condition on the order that any resulting claims be brought in the Patents County Court, ensuring that they would be handled by a specialized tribunal. This is equivalent in our Court to having the matter specially managed which forms part of the Order made herein.

[99] In granting the *Norwich* Order, Justice Arnold concluded with comments regarding the balancing of rights as follows:

146. [...] As discussed above, I have not accepted that the agreements between Golden Eye and the Other Claimants are champertous. Nor have I been persuaded that those agreements mean that the Other Claimants are not genuinely intending to try to seek redress. It does not follow, however, that it is appropriate, when balancing the competing interests, to make an order which endorses an arrangement under which the Other Claimants surrender total control of the litigation to Golden Eye and Golden Eye receives about 75% of the revenues in return. On the contrary, I consider that that would be tantamount to the court sanctioning the sale of the Intended Defendants' privacy and data protection rights to the highest bidder. Accordingly, in my judgment, to make such an order would not proportionately and fairly balance the interests of the Other Claimants with the Intended Defendants' interests. (I do not consider Golden Eye to have any legitimate interest separate from those of the Other Claimants for this purpose.) If the Other Claimants want to

obtain redress for the wrongs they have suffered, they must obtain it themselves.

[Emphasis added.]

[100] In all, Justice Arnold's decision in *Golden Eye* provides useful guidance as to the form and restrictions of an order compelling production by a third-party. The major points from both the U.S. and the UK cases are summarized in the conclusion, below.

### U.S. CASES

[101] In the U.S., copyright holders seeking to ascertain the names and addresses of unnamed alleged infringers are required to file a motion for "expedited discovery", or more precisely, a motion for leave to serve third party subpoenas.

[102] There is a plethora of U.S. cases involving large numbers of alleged copyright infringers which has produced much judicial commentary about "copyright trolls". The following is a list of those cases which have been reviewed, but only some of which are discussed below: *Digital Sin, Inc. v Does 1-27*, 2012 US Dist LEXIS 78832 (SD NY, 2012); *TCYK, LLC v Does 1-88*, 2013 US Dist LEXIS 88402 (ND Ill, 2013); *Breaking Glass Pictures v Does 1-84*, 2012 US Dist LEXIS 88984 (ND Ohio, 2013); *Malibu Media, LLC v John Does, Subscriber Assigned IP Address 69.249.252.44*, 2013 U.S. Dist. LEXIS 77264 (D Pa, 2013); *Patrick Collins, Inc. v John Doe 1*, 2012 US Dist LEXIS 71122 (ED NY, 2013); *Malibu Media, LLC v John Does*, 902 F Supp 2d 690 (ED Pa, 2012); *Ingenuity 13 LLC v John Doe*, 2013 WL 1898633 (CD Cal, 2013); *Malibu Media, LLC v John Does 1-5*, 285 FRD 273 (D NY, 2012); *Third Degree Films, v Does 1-47*, 286 FRD 188 (D Mass, 2012); *Hard Drive Prods., Inc. v Does 1-90*, 2012 US Dist LEXIS 45509 (ND Cal, 2012);

*Combat Zone, Inc v Does 1-84*, 2013 US Dist LEXIS 35439 (D Mass, 2013); and, *Voltage Pictures, LLC v Does 1-198, Does 1-12, Does 1-34, Does 1-371*, (1:13-cv-00293-CL)(D Or, 2013). Many of these cases arise in the context of the pornographic film industry where an alleged infringer may settle quickly and on advantageous terms to the plaintiff to avoid embarrassment and to avoid being identified. There is no suggestion that is the case here.

[103] As in the UK, Courts in the U.S. appear to accept that identifying alleged infringers for purposes of pursuing copyright infringement claims is merited, but the Courts have expressed concern with the use of the courts' subpoena powers to "troll" for quick and easy settlements.

[104] U.S. courts have not shied away from using strong language to admonish the "low-cost, low-risk revenue model" tactics of copyright owners, and in particular adult film companies: "It has become clear in many cases that the companies have no intention of pursuing litigation, but rather initiate a lawsuit to hold a proverbial guillotine over the accused downloaders' heads to extract settlement because of the fear of embarrassment over being accused of downloading pornography" (see, for example, *Patrick Collins, Inc, v John Doe 1*, 2012 US Dist LEXIS 71122 (ED NY, 2013) at p. 5).

[105] *Ingenuity 13 LLC v John Doe*, 2013 WL 1898633 (CD Cal, 2013), a decision cited by CIPPIC, is a particularly egregious example of these cases and involves a "copyright-enforcement crusade" commenced by a group of attorneys. The decision against the plaintiff was rendered by Judge Wright, one of the most vocal judicial critics of the business model employed by many plaintiffs in these cases. However, the case is not helpful in this case because the facts as they

relates to “copyright trolls” involves misrepresentation and fraudulent practices on the part of the plaintiff. No actual evidence of misrepresentation or fraudulent practices is before the Court on this motion. It is only raised as a possibility given Voltage’s approach in other litigation in the U.S. discussed below. However, in one colourful passage Judge Wright observes:

Plaintiffs have outmaneuvered the legal system. They’ve discovered the nexus of antiquated copyright laws, paralyzing social stigma, and unaffordable defense 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 defense. 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. (page 1)

[106] Because of the U.S. civil procedure code, judges have opted to utilize the court’s discretionary powers over joinder of claims to address abuses of power. It is within this context that U.S. courts have opined on “copyright trolls” and their targeting of individuals without any concern to the differences between cases and the factual and legal culpability of numerous defendants. The potential for coercing individuals into settlement is often cited as a reason to prohibit joinder, even where the formal requirements of the rules of civil procedure are met.

[107] Stories regarding coercive litigation tactics employed by “copyright trolls” have affected courts which are hesitant to encourage such activity (see, for example, *Malibu Media, LLC v John Does 1-5*, 285 FRD 273 (D NY, 2012)). In that case, the judge permitted joinder of claims because she was of the view that many of the concerns regarding the pressure to settle could be mitigated by anonymity of the alleged infringer. The Court also took the position that the nature of work that is

protected (adult films) and its accompanying level of embarrassment should not affect the propriety of joinder.

[108] In *Third Degree Films, v Does 1-47*, 286 FRD 188 (D Mass, 2012), the judge described the approach employed by courts across the country as follows:

Against this backdrop of mass lawsuits and potentially abusive litigation tactics, courts nationwide have become sceptical of allowing the adult film companies unfettered access to the judicial processes of subpoenas and early discovery. Furthermore, many courts are eradicating these mass filings on the ground that joinder of tens, hundreds, and sometimes thousands of alleged infringers is improper, and some have admonished the plaintiff adult film companies for evading such substantial court filing fees as they have through the joinder mechanism. Still, a number of courts have upheld the joinder of Doe defendants as proper and efficient, issued subpoenas, and permitted early discovery. (page 5)

[109] The Court also described some of the more egregious tactics used by the plaintiffs, such as in one case harassing telephone calls demanding \$2,900.00 to end the litigation (page 15).

[110] The pursuit of non-judicial remedies aimed at extracting quick settlements from alleged infringers have led judges to deny remedies to plaintiffs (see, *Hard Drive Prods., Inc. v Does 1-90*, 2012 US Dist LEXIS 45509 (ND Cal, 2012). The Court considered the plaintiff's admission that to its knowledge neither it nor any other defendant had ever served a single alleged infringer after early discovery had been granted. Thus, the Plaintiff had failed to establish that granting discovery would lead to identification of and service of the alleged infringers.

[111] However, in an Oregon case involving Voltage (*Voltage Pictures, LLC v Does 1-198, Does 1-12, Does 1-34, Does 1-371*, (1:13-cv-00293-CL)(D Or, 2013)), the Court suggested the most

appropriate method to protect against the risk of coercion is to sever the alleged infringers and require them to be sued individually (see also, *Combat Zone, Inc v Does 1-84*, 2013 US Dist LEXIS 35439 (D Mass, 2013)).

[112] The Oregon Court was not merely concerned with Voltage's avoidance of filing fccs, rather, it strongly criticised Voltage for its "underhanded business model" aimed at raising profits. Judge Aiken expressed doubt about Voltage's claim that it was interested in defending P2P copyright infringement. The sample demand letter before the Court showed that Voltage threatened punitive damages and, in the Court's view, suggested that liability of the alleged infringers was a foregone conclusion. The Court characterized Voltage's attempt to use scare tactics and "paint all Doe users, regardless of degree of culpability in the same light" (page 11) as an abuse of process. The Court observed:

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 powers to drastically reduce litigation costs and obtain, in effect, \$7,500 for its product which, in the case of Maximum Conviction, can be obtained for \$9.99 on Amazon for the Blu-Ray/DVD combo or \$3.99 for digital rental. (page 10)

[113] This highlights an issue raised by CIPPIC to the effect that damage claims in these mass infringement cases often far exceeds any actual damage that may have occurred.

[114] Further, U.S. courts have taken a dim view of demand letters that stated that alleged infringers are being notified because they actually infringed and the case would be dropped if settlement was reached. Courts have characterized this information as erroneous because it assumes that the **person who pays** for internet access at a given location is **the same individual who**

allegedly infringed copyright. For example, in *Combat Zone*, following other judges, the judge characterized this assumption as tenuous and analogous to the assumption that a person who pays the telephone bill also made a specific telephone call (citing *In re BitTorrent Adult Film Copyright Infringement Cases*, 2012 U.S. Dist. LEXIS 61447 at 3).

[115] Counsel for Voltage in this case argued that this case was about nothing more than joinder of defendants. However, in my view that is a mischaracterization. Private information is being sought and the Court ought not to order its release unless there is some protection against it being misused as it has been in the U.S. copyright troll cases.

[116] Notably, no draft letter or order was provided in this case although during the course of argument counsel for Voltage outlined the contents of a proposed letter. Given the order being made herein, the letter will be subject to judicial scrutiny.

[117] Very few U.S. cases address the alleged infringers' privacy and anonymity rights. This issue was most closely canvassed in *Malibu Media, LLC v John Does*, 902 F Supp 2d 690 (ED Pa, 2012), wherein five of the alleged infringers sought to quash third-party subpoenas and moved against the filing of a single complaint joining the multiple all of them. Malibu Media, the producer of adult films and copyright holder, was one of the plaintiffs that had initiated proceedings against unidentified alleged infringers across multiple jurisdictions.

[118] In the course of the action Malibu Media's approach to litigation was described as follows:

When Plaintiff receives this information from the ISPs, it contacts the subscribers associated with the IP addresses, usually by letter, advising them of the lawsuits and offering them an opportunity to settle by payment of a monetary sum. The content of the letters is not yet in the record. Nor does the Court have any information as to the amount of money that Plaintiff typically demands, or whether and to what extent negotiations take place and ultimately lead to settlements. If the John Doe defendant who receives the letter agrees to pay, Plaintiff dismisses the complaint against that defendant with prejudice and without any further court proceedings, thus avoiding the public disclosure of the defendant's identity. If the John Doe defendant refuses to settle, or Plaintiff has been unable to serve the complaint within the 120 days required under Rule 4(m) of the Federal Rules of Civil Procedure, subject to any extension granted by the court, with whatever information is provided by the ISP, Plaintiff dismisses the complaint against that defendant without prejudice to Plaintiff's ability to commence a subsequent action against that defendant. In this fashion, Plaintiff has initiated hundreds of lawsuits in various district courts throughout the country, but has not yet proceeded to trial in any case.(page 5)

(emphasis added)

[119] This appears to be a typical description of how copyright trolling or speculative invoicing works. In that case the alleged infringers argued that their right to remain anonymous outweighed the plaintiff's potential proprietary interests in the copyright. The Court disagreed and held that the third-party subpoenas did not unduly burden these potential defendants. The court acknowledged that its order impeded the right to anonymity on the internet and implicates First Amendment rights under the U.S. Constitution. Nonetheless, the court determined that the standard used by prior courts when granting third-party subpoenas was an appropriate means of balancing competing interests at stake. This standard requires the court to balance five factors:

- (1) the concreteness of the plaintiff's showing of a *prima facie* claim of actionable harm;
- (2) the specificity of the discovery request;

- (3) the absence of alternative means to obtain the subpoenaed information;
- (4) the need for the subpoenaed information to advance the claim; and
- (5) the objecting party's expectation of privacy.

[120] These factors bear some similarity to the *BMG* factors discussed above. The Court was of the view that the factors weighed in favour of the plaintiff because any detriment to the expectation of privacy could be mitigated by granting their request to proceed anonymously.

[121] The Court also acknowledged that subscriber information may not directly identify defendants but noted that it would likely allow the plaintiff, to identify the actual infringer. Curiously, the Court did not consider whether this was likely to occur considering the plaintiff's approach to this litigation, set out above. The Court did state, however, that: "The purpose of the joinder rules is to promote efficiency, not to use Federal District Courts as small claims collection agencies, by putting economic pressure on individuals who do not have substantive liability" (page 11).

[122] Ultimately, the Court did not sever the claims but rather stayed all claims but those of the five alleged infringers who brought the motions. He ordered these to proceed forward as a "Bellweather trial" (a type of test case intended to give parties an indication of what is likely to happen in future proceedings of the same nature).

[123] Interestingly, the Court also provided the following warning, suggesting that the plaintiff's intention to actually pursue claims may be relevant in future proceedings:

Although the Court cannot prevent the parties from settling these claims, the Court assumes that Plaintiff will welcome this opportunity to prove its claims promptly pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the copyright laws, which may, if Plaintiff is successful, lead to an injunction enjoining the practices about which Plaintiff complains. If Plaintiff decides instead to continue to "pick off" individual John Does, for confidential settlements, the Court may draw an inference that Plaintiff is not serious about proving its claims, or is unable to do so. (page 11) (emphasis added)

[124] Despite these judicial pronouncements, courts in the U.S. remain somewhat ambiguous on the question of whether a plaintiff's intention to pursue litigation against alleged infringers is relevant to allowing disclosure of information.

[125]. These decisions also provide almost no analysis of evidence required to establish a *prima facie* case, which is part of the good cause standard applied. In most of these cases reference is made to evidence from forensic investigators. The good cause standard was met where the evidence identified the IP address of each alleged infringer, the city in which the address was located, the date and time of the infringing activity and the ISP of the address (*Malibu Media*, 902 F Supp 2d 690).

#### Summary of UK and U.S. cases

[126] The decisions reviewed suggest that courts in both the UK and U.S. are particularly concerned with sanctioning a business model that coerces innocent people into settlements.

[127] Both jurisdictions appear open to imposing safeguards and overseeing the disclosure process to ensure that plaintiffs do not misrepresent the effects of the *Norwich* Order.

[128] These courts have also generally accepted that users identified by the disclosure may not be the actual infringers but may have information that leads to the alleged infringer. Cases such as *Combat Zone* are particularly useful as guidelines because they prohibit plaintiffs from referring to letter recipients as defendants.

[129] With respect to privacy concerns, the cases in both jurisdictions suggest that such issues are of secondary importance as the law generally does not shield wrongdoing for reasons of privacy. Thus, the question of the extent of actual wrongdoing, once it has been established, is important.

[130] U.S. law clearly imposes a *prima facie* standard on plaintiffs but it is difficult to ascertain how the evidence mentioned in the cases meets that higher standard. It could be that U.S. courts are far more familiar with these types of claims and the evidence required to establish infringement. Interestingly, U.S. courts acknowledge that the identified IP address subscriber may not be the actual infringer for a number of reasons, but do not discuss the technical flaws of techniques used to trace IP addresses, an issue identified by CIPPIC.

[131] UK courts require claimants to establish an arguable case of infringement. In *Golden Eye* the Court held that technical and non-technical uncertainties were not sufficient to deny the request for disclosure.

[132] Thus, although CIPPIC asserts that U.S. and UK cases recognize a need to assess the strength of a cause of action as a pre-requisite, it is not clear from a review of these cases what this

actually means in practice. Based on the evidence on this motion there is a *bona fide* case of copyright infringement. The real question is the form of remedy.

### CONCLUSION

[133] Having considered all of the evidence of the parties, their submissions and the jurisprudence, there is a number of principles to be gleaned. These principles are in addition to the tests to be applied from *BMG*. The Court should give consideration to these principles to weigh and balance the privacy rights of potentially innocent users of the internet versus the right of copyright holders to enforce their rights. The Court ought to balance these rights in assessing the remedy to be granted. Where evidence suggests that an improper motive may be lurking in the actions of a copyright holder plaintiff, the more stringent the order. However, it would only be in a case where there was compelling evidence of improper motive on behalf of a plaintiff in seeking to obtain information about alleged infringers that a Court might consider denying the motion entirely. The *Copyright Act* engages the Court to enforce copyright and the rights that go with the creation of copyrighted works. Absent a clear improper motive the Court should not hesitate to provide remedies to copyright holders whose works have been infringed.

[134] In summary, the following is a non-exhaustive list of considerations which flow from cases in the U.S., UK and Canada:

- a) The moving party must demonstrate a *bona fide* case;
- b) Putting safeguards in place so that alleged infringers receiving any "demand" letter from a party obtaining an order under Rule 238 or a *Norwich* Order not be

intimidated into making a payment without the benefit of understanding their legal rights and obligations;

- c) When issuing a *Norwich* Order the Court may retain the authority to ensure that it is not abused by the party obtaining it and can impose terms on how its provisions are carried out;
- d) The party enforcing the *Norwich* Order should pay the legal costs and disbursements of the innocent third-party;
- e) Specific warnings regarding the obtaining of legal advice or the like should be included in any correspondence to individuals who are identified by the *Norwich* Order;
- f) Limiting the information provided by the third party by releasing only the name and residential address but not telephone numbers and e-mail addresses;
- g) Ensuring there is a mechanism for the Court to monitor the implementation of the *Norwich* Order;
- h) Ensuring that the information that is released remains confidential and not be disclosed to the public and be used only in connection with the action;
- i) Requiring the party obtaining the order to provide a copy of any proposed "demand" letter to all parties on the motion and to the Court prior to such letter being sent to the alleged infringers;
- j) The Court should reserve the right to order amendments to the demand letter in the event it contains inappropriate statements;
- k) Letters sent to individuals whose names are revealed pursuant to Court order must make clear that the fact that an order for disclosure has been made does not mean

that the court has considered the merits of the allegations of infringement against the recipient and made any finding of liability;

- l) Any demand letter should stipulate that the person receiving the letter may not be the person who was responsible for the infringing acts;
- m) A copy of the Court order, or the entire decision should be included with any letter sent to an alleged infringer; and,
- n) The Court should ensure that the remedy granted is proportional.

[135] On the facts of this case, there is some evidence that Voltage has been engaged in litigation which may have an improper purpose. However, the evidence is not sufficiently compelling for this Court at this juncture in the proceeding to make any definitive determination of the motive of Voltage. They have demonstrated on their evidence that they copyright in the Works; that the forensic investigation concluded that there are alleged infringers who have downloaded the Works via the P2P and BitTorrent system; that TekSavvy, a non-party is the ISP that has information such as names and addresses of its Subscribers who are alleged by Voltage to have infringed; quite properly, 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.

[136] 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. 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.

[137] In order to ensure the Court maintains control over the implementation of the order, this action will proceed as a specially managed action and a Case Management Judge will be appointed who will monitor, as necessary, the conduct of Voltage in its dealings with the alleged infringers.

[138] Further, in order to ensure there is no inappropriate language in any demand letter sent to the alleged infringers, the draft demand letter will be provided to the Court for review. The letter should contain a statement that no Court has yet found any recipient of the letter liable for infringement and that recipients should legal assistance. The reasonable legal costs, administrative costs and disbursements of TekSavvy in providing the information will be paid to TekSavvy prior the information being provided. The information will be limited only to the name and address of the IP addresses as set out in the schedule to the affidavit of Barry Logan which schedule is attached as Schedule A to these reasons and order. Any further directions or additions to the Order will be dealt with by the Case Management Judge. All participants on this motion and any intended defendant shall be able to seek a case conference with the Case Management Judge to review issues arising in the proceeding.

[139] In my view, the Order herein balances the rights of internet users who are alleged to have downloaded the copyrighted Works against the rights of Voltage to enforce its rights in those Works. A Case Management Judge will be in a good position to maintain that balance and ensure

that Voltage does not act inappropriately in the enforcement of its rights to the detriment of innocent internet users.

**ORDER****THIS COURT ORDERS that:**

1. This action shall continue as a specially managed proceeding and be referred to the Office of the Chief Justice for the appointment of a Case Management Judge.
2. TekSavvy Solutions Inc. (TekSavvy) shall disclose to the Plaintiff the contact information, in the form of the names and addresses, to the extent it is able, of the TekSavvy customer accounts (Subscribers) associated with the IP addresses attached as Exhibit B to the affidavit of Barry Logan.
3. All reasonable legal costs, administrative costs and disbursements incurred by TekSavvy in abiding by this Order shall be paid by the Plaintiff to TekSavvy.
4. The reasonable legal costs and disbursements of TekSavvy referred to in paragraph 3 herein shall be paid prior to the release to the Plaintiff of the information referred to in paragraph 2 herein.
5. The Plaintiff shall include a copy of this Order in any correspondence that is sent to any of the Subscribers identified by TekSavvy pursuant to this Order.

6. Any of the Subscribers may request a full copy of these Reasons for Order and Order from the Plaintiff and the Plaintiff shall provide a copy at no charge to each Subscriber requesting a copy.
7. Any separate actions commenced by the Plaintiff against any of the Subscribers shall be case managed in connection with this case.
8. Any correspondence sent by Voltage to any Subscriber shall clearly state in bold type that no Court has yet made a determination that such Subscriber has infringed or is liable in any way for payment of damages.
9. A draft of the proposed letter to be sent to Subscribers shall be provided to the parties to this motion and to the Court and be the subject of a case conference with the Case Management Judge to review and approve the contents of the letter before being sent to any Subscriber.
10. The release of the information by TekSavvy shall remain confidential and not be disclosed to any other parties without further order of the Court and only be used by the Plaintiff in connection with the claims in this action.
11. The Plaintiff shall undertake to the Court not to disclose to the general public by making or issuing a statement to the media any of the information obtained from TekSavvy.

- 12. All participants on this motion and any intended Defendant shall have the right to seek a case conference with the Case Management Judge to review issues arising in the proceeding.
  
- 13. Any further amendments or additions to this Order shall be within the discretion of the Case Management Judge.

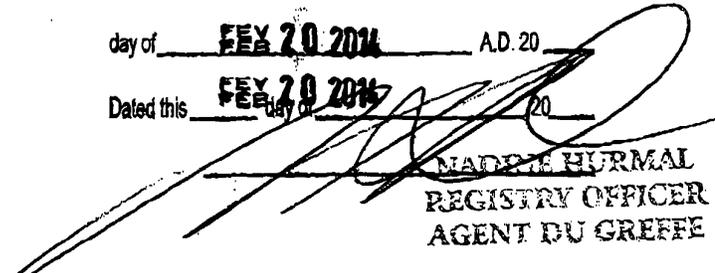
“Kevin R. Aalto”

Prothonotary

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the \_\_\_\_\_

day of FEB 20 2016 A.D. 20

Dated this FEB 20 2016 day of \_\_\_\_\_ 20



NADINE HORMAL  
 REGISTRY OFFICER  
 AGENT DU GREFFE

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2058-12

**STYLE OF CAUSE:** VOLTAGE PICTURES LLC  
v.  
JOHN DOE AND JANE DOE

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 25, 2013

**REASONS FOR ORDER:** AALTO P.

**DATED:** February 20, 2014

**APPEARANCES:**

P. James Zibarras  
John Philpott

FOR THE PLAINTIFF

Nicholas McHaffie  
Christian Tacit

FOR THE DEFENDANT

David Fewer

FOR THE INTERVENOR

**SOLICITORS OF RECORD:**

Brauti Thorning Zibarras LLP  
Toronto, Ontario

FOR THE PLAINTIFF

TekSavvy Solutions Inc.  
c/o Stikeman Elliott LLP  
Ottawa, Ontario

FOR THE DEFENDANT

Federal Court



Cour fédérale

Date: 20130118

Docket: T-2058-12

Ottawa, Ontario, January 18, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

VOLTAGE PICTURES LLC

Plaintiff

and

JOHN DOE AND JANE DOE

Defendants

**ORDER**

UPON request by the proposed intervener, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC"), for an adjournment of this motion pending a decision in CIPPIC's motion seeking to intervene in this proceeding (the "Intervener Motion");

AND UPON noting the support for the adjournment by the non-party respondent, TekSavvy Solutions Inc. ("TekSavvy");

AND UPON noting the objection of the Plaintiff to the granting of an adjournment;

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**AND UPON** noting the undertaking by TekSavvy to preserve all information responsive to the Plaintiff's motion for an Order pursuant to Rule 238 of the Federal Courts Rules that is in TekSavvy's possession;

**AND UPON** noting the undertaking of TekSavvy to forward a letter from the Plaintiff demanding that the recipient refrain from any infringement of copyright in works by Voltage to the contact information TekSavvy has been able to identify as being correlated to the Internet Protocol addresses contained in Exhibit "B" to the Affidavit of Barry Logan, sworn December 7, 2012, at no cost to the Plaintiff;

**AND UPON** hearing the submissions of counsel for TekSavvy, the agent for CIPPIC, and counsel for the Plaintiff;

**THIS COURT ORDERS that:**

[1] The hearing of this motion for an Order pursuant to Rule 238 of the *Federal Courts Rules* is adjourned *sine die* pending determination by this Court of CIPPIC's Intervener Motion;

[2] Should CIPPIC be granted leave to intervene without the right to cross-examine and/or adduce affidavit evidence, it shall file its Responding materials within TEN (10) business days of receipt of the Court's reasons granting such leave and that the Plaintiff's motion for an Order pursuant to Rule 238 of the *Federal Courts Rules* is to proceed at a

special sitting with a duration of ONE (1) day, on a date to be determined between counsel and the Registrar that is within THIRTY (30) days of receipt of the Court's reasons on CIPPIC's Intervener Motion, or the earliest date thereafter available to the Court, unless all counsel acting reasonably agree otherwise.

[3] Should CIPPIC be granted intervenor status with the right to cross-examine and/or adduce evidence, CIPPIC shall serve such affidavit evidence within TEN (10) business days of receipt of the Court's reasons granting such status and that the parties, acting reasonably, shall set a timetable for all other remaining steps, including cross-examinations (if applicable) and the filing of Memoranda of Fact and Law (if applicable), which shall include that the Plaintiff's motion for an Order pursuant to Rule 238 of the *Federal Courts Rules* is to proceed at a special sitting with a duration of ONE (1) day, on a date to be determined between counsel and the Registrar, that is within SIXTY (60) days of receipt of the Court's reasons on CIPPIC's Intervener Motion, or the earliest date thereafter available to the Court, unless all counsel acting reasonably agree otherwise.

[4] No order as to costs.

"Leonard S. Mandamin"

Judge

Federal Court



Cour fédérale

**Date: 20130131****Docket: T-2058-12****Citation: 2013 FC 112****BETWEEN:****VOLTAGE PICTURES LLC****Plaintiff****and****JOHN DOE AND JANE DOE****Defendants****REASONS FOR ORDER****MANDAMIN J.**

[1] The Plaintiff's motion came before me on January 14, 2013. After hearing from counsel, I decided to adjourn the motion and gave oral reasons for doing so. I indicated I would set out my reasons for doing so in writing.

[2] By way of background, the Plaintiff, Voltage Pictures LLC [Voltage], has an action in Federal Court claiming copyright infringement by John Doe and Jane Doe who are alleged to copy and distribute Voltage's cinematic works [the Works] over internet peer to peer networks using the BitTorrent Protocol. Voltage brought a Motion for an Order under Rule 238 of the *Federal Courts Rules* that TekSavvy Solutions Inc. [TekSavvy], an internet service provider and a non-party to the

action, be required to disclose to Voltage the names and addresses of TekSavvy customer accounts associated with IP addresses of senders or peers offering any of the files associated with Voltage's Works. These IP addresses had been identified by a forensic investigation firm, Canipre, to scan BitTorrent networks for the presence of the Works.

[3] The motion was initially adjourned to enable TekSavvy to notify those customers who may be affected by Voltage's motion. In the interim, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic [CIPPIC] filed a motion to intervene in this proceeding. That motion to intervene is not before me and is still pending.

[4] In the matter before me, Voltage wished to proceed with its motion while CIPPIC sought an adjournment until after its motion to intervene is considered. TekSavvy took no position on Voltage's motion but supported the CIPPIC request for an adjournment. As matters thus stood, if Voltage's motion for release of customer information by TekSavvy were to proceed, it would be unopposed.

[5] I granted the request for an adjournment for several reasons.

[6] First, proceeding on the basis of an unopposed motion is risky in the sense that the Court is hearing only one side. There have been any number of occasions where a Court, upon hearing subsequently from the other side, has had to change course. The Court is better served in coming to a proper decision having heard from differing sides.

[7] Second, Voltage's action is one in copyright. Parliament has passed new legislation on copyright. It is not yet certain how this new copyright legislation will impact proceedings for copyright infringement. Is the matter proceeding under previous copyright law or under the new enactment? Is there a transitional stage? In my view, the early steps taken in adjudicating new legislation are important and it is important. To be able to do so properly, a Court needs to be as informed as it can be about the matter.

[8] Third, on review of the material and the forensic investigation material, it seems to me there are factual matters that require more explanation. What is the link between IP numbers and the alleged copyright infringers? Is it direct or indirect? Is it a link to a device or to an individual? Again, more information or submissions may be of assistance to the Court.

[9] Fourth, this proceeding raises a question about Court resources. The numbers provided to me indicate there could possibly be over a thousand defendants. The question arises as to how the Court is going to manage the proceeding and this may bring in the need for a specially managed proceeding under Rule 383 of the *Federal Courts Rules*.

[10] Finally, I do not believe the Plaintiff's motion can be adequately heard during the time allotted for general motions. More time would be required. Accordingly, the Plaintiff's motion should be set down for a special sitting on a date which follows the conclusion of the motion to intervene.

[11] The Plaintiff raised the question of prejudice caused by delay in hearing its motion. I am satisfied that the undertaking by TekSavvy to preserve all information responsive to the Plaintiff's motion and its further undertaking to forward a notice that recipients identified as being correlated to the IP addresses in question refrain from any infringement of copyright in the Works addresses the question of prejudice in the interim until the motion is heard.

[12] In result, the foregoing considerations led me to decide to adjourn this motion until the CIPPIC motion is decided. The parties had the opportunity to propose terms of a draft order, which I found to be satisfactory. I issued the Order in question on January 18, 2013.

"Leonard S. Mandamin"

Judge

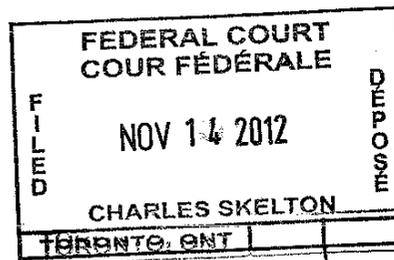
Ottawa, Ontario  
January 31, 2013

INDEX

T-2058-12

Court File No.

FEDERAL COURT



BETWEEN:

VOLTAGE PICTURES LLC

Plaintiff

-and-

JOHN DOE AND JANE DOE

Defendants

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STATEMENT OF CLAIM

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TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-991-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

TORONTO, this 14<sup>th</sup> day of November, 2012

**CHARLES SKELTON  
REGISTRY OFFICER  
AGENT DU GREFFE**

Issued by: \_\_\_\_\_

Address of local office:  
Federal Court of Canada  
180 Queen Street West  
Toronto, ON M5V 3L6

Tel.: (416) 973-3356  
Fax.: (416) 954-5068

Defendants: **John Doe and Jane Doe**  
Addresses Unknown

**CLAIM**

1. The Plaintiff, Voltage Pictures LLC (“Voltage”), claims against John Doe, Jane Doe and other persons unknown (collectively, the “Defendants”) for:
  - a) a declaration that the Defendants’ unauthorized reproduction and distribution of the Plaintiff’s copyrighted cinematographic works, listed in Schedule “A” (the “Works”), constitutes an infringement of the Plaintiff’s rights contrary to sections 27(1) and 27(2) of the *Copyright Act*;
  - b) an interim, interlocutory and permanent injunction restraining each Defendant, and any and all persons acting on behalf of or in conjunction with any of them or any and all persons with notice of this injunction, from downloading, reproducing, and distributing the Works;
  - c) statutory damages pursuant to s. 38.1 of the *Copyright Act*;
  - d) in the alternative, actual damages pursuant to s. 35 of the *Copyright Act* in an amount to be proven at trial;
  - e) an accounting of all profits from the Defendants’ wrongful activities;
  - f) damages for conversion, unlawful interference with economic relations and unjust enrichment in an amount to be proven at trial;
  - g) aggravated, exemplary and punitive damages in the amount of \$10,000.00;
  - h) special damages, the particulars of which will be provided prior to trial;

- i) pre-judgment and post-judgment interest pursuant to ss. 36 and 37 *Federal Court Act*, R.S.C. 1985, c. F-7, as amended;
- j) costs of this action on a substantial indemnity basis, plus applicable taxes;  
and
- k) such further and other relief as this Honourable Court may deem just.

### **The Parties**

2. The Plaintiff, Voltage Pictures LLC (“Voltage”), is a movie production company based in Los Angeles, California, with exclusive rights to lawfully distribute the Works in Canada.

3. The Defendants are persons whose names and identities are currently unknown to the Plaintiff, but who have unlawfully and without Voltage’s authorization or consent copied and distributed Voltage’s protected Works in breach of the laws of Canada.

### **The Unauthorized Distribution of the Works Through the BitTorrent Protocol**

4. The Defendants are members of peer-to-peer (“P2P”) internet networks that have used the BitTorrent Protocol to copy and distribute the Works without authorization.

5. The BitTorrent Protocol is a P2P file sharing protocol that facilitates the distribution of large amounts of data over the internet through networks.

6. When a file is initially uploaded to a P2P network, that is referred to as “seeding”. Other P2P networks users, called “peers”, can then connect to the user seeding the file in order to copy it.

7. The BitTorrent Protocol breaks a file into numerous small data packets, each of which is identifiable by a unique hash number created using a hash algorithm. Once a file has been broken into numerous packets, other network users or peers are able to download different sections of the same file from multiple users. Each new peer is directed to the most readily available packet of the file they wish to download. In other words, a peer does not copy a file from one user, but from any peer who previously downloaded the file and has it available on the BitTorrent network. The peer then becomes a seeder as it distributes the data packet to other peers connected to the BitTorrent network.

8. Once a packet is downloaded by a peer, that peer automatically becomes a download source for other peers connected to the Bit Torrent network who are requesting the file. This speeds up the time it takes to download a file and frees up the capacity of a computer or server to simultaneously download and upload files. Unless the settings on the user's BitTorrent program are changed, every user who is copying or who has copied a file is simultaneously distributing it to every other user or peer connected to the BitTorrent network. This allows even small computers with low bandwidth to participate in large data transfers across a P2P network.

#### **The Actions of the Defendants**

9. Through a forensic investigation, the Plaintiff has identified the Defendants (identified by their Internet Protocol ("IP") addresses), as having participated through P2P networks in the unauthorised copying and distribution of Voltage's Works. An IP address is a unique numerical identifier assigned to an internet user by that user's internet

service provider (“ISP”). Once the Plaintiff obtains the Defendants’ contact information from their ISPs, it will be able to name those Defendants as parties to this claim.

10. In simple terms, the Defendants are engaging in the flagrant theft of Voltage’s works and, in addition, are intentionally facilitating and assisting in the theft of those same Works by others, on an international scale.

11. Voltage has a right to receive revenues, proceeds, and profits from its Works and has a proprietary interest in this right. Through their conduct, the Defendants have:

- a) contravened the *Copyright Act*;
- b) converted Voltage’s proprietary rights unto themselves;
- c) deprived Voltage of revenues and other consideration; and
- d) unlawfully interfered with Voltage’s economic relations.

12. All of the Defendants’ activities are done without the authorization of Voltage and without any payment or compensation to Voltage.

13. Voltage is therefore entitled to an accounting and disgorgement of all revenues and profits (in whatever form) made by the Defendants from the wrongful conversion of Voltage’s property, and damages from the losses of actual and prospective proceeds as a result of the Defendants’ acts.

14. By trafficking in, offering and distributing the Works, the Defendants have directly and intentionally facilitated the unauthorized reception, distribution and use of Voltage’s protected works by persons not authorized to receive them. The Defendants

have thereby unlawfully interfered with Voltage's economic relations with its customers and lawful distributors, and are liable therefor.

15. By reason of the foregoing, the Defendants are liable for all pecuniary losses suffered by Voltage as a result of their interference.

16. Voltage generates its revenues through the lawful distribution and sales of its works. It is critical to Voltage that access to its Works be conditional on payment of a purchase price. The sole purpose of the Defendants' P2P activities, apart from commercial gain, is to permit consumers to receive and view Voltage's Works without payment to Voltage and without charge. The Defendants' activities are carried out intentionally, with full knowledge of Voltage's rights, and without Voltage's consent. As a direct and proximate result of their wrongful acts, the Defendants have been unjustly enriched and Voltage has suffered, and will continue to suffer, loss of revenues, proceeds and profits. The exact amount of unjust profits realized by the Defendants and profits lost by Voltage are presently unknown and cannot be readily ascertained without an accounting.

### **Damages**

17. The Plaintiff claims statutory damages pursuant to s. 38.1 of the *Copyright Act*.

18. Alternatively, the Plaintiff claims damages pursuant to s. 35 of the *Copyright Act* in an amount to be proven at trial.

19. Voltage sustains an economic loss every time the Defendants use P2P networks to make the Works available to be received and viewed. As a result of the Defendants'

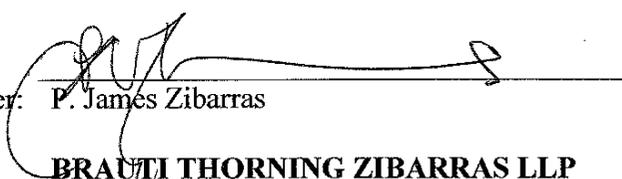
conduct in copying and distributing the Works, Voltage has suffered and continues to suffer loss, damage and expense, in an amount to be proved at trial, while the Defendants have benefited and profited and continue to benefit and profit from their wrongful activities.

20. The Defendants have acted in a high-handed, malicious, and reprehensible fashion, and in wanton and reckless disregard for Voltage's rights, which ought not to be countenanced by this Honourable Court. Accordingly, Voltage is entitled to punitive, aggravated, and exemplary damages.

21. The Plaintiff proposes this action be tried in Toronto, Ontario.

DATED AT TORONTO, this 14<sup>th</sup> day of November, 2012.

**BRAUTI THORNING ZIBARRAS LLP**

Per:   
P. James Zibarras

**BRAUTI THORNING ZIBARRAS LLP**

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Lawyers for the Plaintiff,  
**VOLTAGE PICTURES LLC**

**SCHEDULE "A"****Voltage's Cinematographic Works**

Generation Um ... (2012)  
Tucker & Dale vs Evil (2010)  
The Whistleblower (2010)  
True Justice: Brotherhood (2010)  
The Third Act aka The Magic of Belle Isle (2012)  
Breathless (2012)  
Peace Love & Misunderstanding (2011)  
Conviction (2010)  
The Good Doctor (2011)  
Faces in the Crowd (2011)  
Rosewood Lane (2011)  
Puncture (2011)  
Another Happy Day aka Reasonable Bunch (2011)  
The Barrens (2012)  
True Justice: Lethal Justice (2010)  
True Justice: Blood Alley (2010)  
Killer Joe (2011)  
Maximum Conviction (2012)  
Fire with Fire (2012)  
Rites of Passage (2012)  
True Justice: Urban Warfare (2010)  
True Justice: Deadly Crossing (2010)  
Rites of Passage AKA Party Killers (2012)  
Balls to the Wall (2011)  
Sacrifice (2011)  
Escapee (2011)  
True Justice: Dark Vengeance (2010)

Court File No.

**VOLTAGE PICTURES LLC**  
Plaintiff

and

**JOHN DOE and JANE DOE**  
Defendants

**FEDERAL COURT**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

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Lawyers for the Plaintiff,  
**VOLTAGE PICTURES LLC**

Court File No. T-2058-12

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

VOLTAGE PICTURES LLC

Plaintiff

- and -

JOHN DOE AND JANE DOE

Defendants

- and -

TEKSAVVY SOLUTIONS INC.

Responding Party

- and -

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY  
AND PUBLIC INTEREST CLINIC

Intervener

**WRITTEN REPRESENTATIONS OF TEKSAVVY SOLUTIONS INC.**  
*(Re: Reasonable Legal Costs, Administrative Costs and Disbursements)***STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors  
Suite 1600, 50 O'Connor Street  
Ottawa, Canada K1P 6L2**Nicholas McHaffie**  
Tel: (613) 566-0546**Alexander Sarabura**  
Tel: (613) 564-3474

Fax: (613) 230-8877

Solicitors for the Responding Party,  
TekSavvy Solutions Inc.

## PART I - OVERVIEW

1. On February 20, 2014, Prothonotary Aalto ordered TekSavvy Solutions Inc. to disclose to Voltage Pictures LLC, to the extent able, contact information of TekSavvy customer accounts associated with certain IP addresses identified by Voltage. As an important term of that Order, Prothonotary Aalto ordered that “[a]ll reasonable legal costs, administrative costs and disbursements incurred by TekSavvy in abiding by this Order” be paid by Voltage before the disclosure, and observed that “[a]ny dispute regarding those costs can be resolved by the Case Management Judge.”<sup>1</sup>

2. TekSavvy now seeks recovery of those “reasonable legal costs, administrative costs and disbursements”, the three headings under which Prothonotary Aalto’s Order organized costs that TekSavvy would not have incurred but for Voltage’s Rule 238 motion. This Honourable Court is therefore called upon to review the intended scope of Prothonotary Aalto’s Order and assess the reasonableness of the legal costs, administrative costs and disbursements incurred by TekSavvy.

3. It is submitted that the costs term of Prothonotary Aalto’s *Norwich* Order was intended to have the effect that the *Norwich* case itself describes: to ensure that “the full costs of the respondent ... and any expense incurred in providing the information be borne by the applicant.”<sup>2</sup> Neither the language of the Order and its Reasons, nor the context in which these were given, suggest a more restrictive intent. To the contrary, Prothonotary Aalto clearly recognized, as the Court of Appeal did in *BMG Canada Inc. v. Doe*,<sup>3</sup> that it was appropriate for TekSavvy to be compensated for the expense to which it had been put as an innocent third party to the litigation.

4. TekSavvy’s Bill of Reasonable Legal Costs, Administrative Costs and Disbursements (“Bill of Costs”) is found at Tab 1 of this Record. It claims the sum of \$178,820.98 in legal costs; \$108,616.68 in administrative costs; and \$60,043.02 in

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<sup>1</sup> Order and Reasons of Prothonotary Aalto, February 20, 2014, Record of TekSavvy Solutions Inc. (“TekSavvy Record”), Tab 14, at para. 3 (Order) and para. 135 (Reasons).

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

<sup>3</sup> *BMG Canada Inc. v. Doe*, 2005 FCA 193, Authorities, Tab 3, at para. 35, aff’ing *BMG Canada Inc. v. Doe*, 2004 FC 488, Authorities, Tab 4, at paras. 13(d) and 35.

- 2 -

disbursements, for a total of \$346,480.68. All of these costs (and in fact more) were incurred by TekSavvy in acting on Voltage's request for contact information, and thus in abiding by the Order of Prothonotary Aalto, each under one of the three heads of costs set out in the Order. These costs are fully supported by the evidence of witnesses from TekSavvy: Marc Gaudrault (CEO), Pascal Tellier (CIO) and Pierre Aubé (COO). The evidence of these witnesses as to the costs incurred was unshaken on cross-examination, and indeed largely unchallenged.

5. TekSavvy's costs must be assessed in the context in which they were incurred. The relief requested by Voltage—customer information associated with over 2,000 IP addresses—was unprecedented, not only in TekSavvy's experience, but by private claimants in Canada. Responding to the request required TekSavvy to (a) undertake significant technical measures to accurately correlate the large number of Internet Protocol (IP) addresses to customer account information; (b) communicate with individuals registered to these accounts to ensure they had appropriate notice of the request and to ensure the reasonableness of the correlation; (c) respond to a massive increase in customer inquiries relating to the Voltage motion; (d) take legal advice on TekSavvy's rights and obligations in respect of the request for release of personal information, including representation on the motion; and (e) respond to a malicious distributed denial-of-service ("DDoS") attack on its business.

6. These costs were particularly significant to TekSavvy as it is a smaller Internet Service Provider (ISP). As Mr. Gaudrault states, at times "effectively everyone in the company was occupied with responding to and addressing the motion brought by Voltage."<sup>4</sup> Voltage made a deliberate tactical decision, on the recommendation of its investigative firm, Canipre Inc., to name TekSavvy as the responding party to its precedent-setting motion given its smaller size.<sup>5</sup> The costs flowing from that decision are appropriately borne by Voltage, based on both Voltage's undertaking to reimburse reasonable expenses incurred by TekSavvy, and Prothonotary Aalto's Order.

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<sup>4</sup> Affidavit of Marc Gaudrault, sworn June 27, 2014 ("Gaudrault Affidavit"), TekSavvy Record, Tab 2, at para. 51.

<sup>5</sup> Transcript from the Cross-Examination of Barry Logan, October 9, 2014 ("Logan Transcript"), TekSavvy Record, Tab 11, at pp. 46-48, QQ. 160-165.

- 3 -

7. The costs claimed in TekSavvy's Bill of Costs are conservative and do not reflect the full direct or indirect impact of Voltage's motion. For example, the claimed costs do not include the extensive time spent on the issue by Mr. Gaudrault, and do not reflect the motion's impact on TekSavvy's subscriber base and revenues. TekSavvy's Bill of Costs fairly reflects the reasonable costs it incurred in abiding by the Order.

8. While Voltage has tendered three responding affidavits, much of this evidence is inadmissible and/or entirely irrelevant to TekSavvy's claim for the costs ordered by Prothonotary Aalto, seeking to impugn TekSavvy's business and its customers at large.<sup>6</sup> These responding affidavits and their attacks on TekSavvy's business, on TekSavvy's approach to the correlation exercise, and on TekSavvy's conduct in this proceeding are addressed largely in the final portion of these representations.

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

### **A. Voltage's Action**

9. Voltage's action alleges that unidentified "Doe" Defendants have engaged in illegal file-sharing over the Internet, and thereby infringed copyright in certain cinematographic works.<sup>7</sup> Through an investigation conducted by Canipre, Voltage identified IP addresses associated with alleged copyright violations, but had no name or address information to associate with the IP addresses.<sup>8</sup> The costs at issue were incurred by TekSavvy in connection with Voltage's Rule 238 motion seeking disclosure of the personal contact information of subscribers whose customer accounts were associated with the IP addresses at the time of the alleged infringement.

10. The IP addresses at issue in the action are all addresses that have been assigned to TekSavvy. Based in Chatham, Ontario, TekSavvy is a relatively small (but growing) telecommunications provider when compared to larger providers such as

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<sup>6</sup> As Voltage put the evidence forward and insisted on its relevance, TekSavvy had to cross-examine, such that much of the cross-examination is also ultimately irrelevant to the issues before the Court.

<sup>7</sup> Statement of Claim, issued November 14, 2012, TekSavvy Record, Tab 16.

<sup>8</sup> An IP address is assigned to a device (not a person), and may be assigned to different devices at different times. Multiple individuals may use a device with a given IP address, and an individual may use multiple devices: Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 6-7; Reasons, TekSavvy Record, Tab 14, at para. 15; Logan Transcript, TekSavvy Record, Tab 11, at pp. 11-12, QQ. 24-27.

- 4 -

Bell, Rogers or others.<sup>9</sup> Unknown to TekSavvy until this motion, Canipre in fact recommended to Voltage that the action (and thus Voltage's motion for a *Norwich* Order) be directed at subscribers of TekSavvy, based in part on the size of TekSavvy.<sup>10</sup> TekSavvy is not named as a defendant in the Voltage action.

11. An overview timeline of the procedural steps in relation to Voltage's motion, from Mr. Gaudrault's affidavit, is reproduced at Appendix A to these representations. The relevant procedural background is summarized below; further details are set out in paragraphs 11 to 39 of Mr. Gaudrault's affidavit, found at Tab 2.

### **B. Voltage's Demand of TekSavvy and Pre-Motion Activities**

12. Mr. Logan of Canipre first contacted TekSavvy in mid-October, 2012, advising that he would be seeking disclosure of subscriber information in relation to "fraud activities", and requesting information about "how it is that TekSavvy will determine the information from a technical view point". TekSavvy responded promptly, providing technical information as requested.<sup>11</sup> On November 1, 2012, Voltage provided draft motion materials, identifying over 4,500 IP addresses for which it sought subscriber information, and proposing a motion date of November 19, 2012.<sup>12</sup>

13. From the outset, TekSavvy took the position ("quite properly", as Prothonotary Aalto found) that it would not disclose customer account information without a Court order requiring disclosure, and appropriate privacy safeguards in place to protect those whose personal information was being sought.<sup>13</sup> Although TekSavvy requested that Voltage provide it with a draft order that would address such safeguards on two separate occasions, Voltage never provided one.<sup>14</sup>

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<sup>9</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 4-5.

<sup>10</sup> Logan Transcript, TekSavvy Record, Tab 11, at pp. 46-48, QQ. 160-165. Canipre was also apparently influenced by TekSavvy's "marketing" and an unexplained and unsubstantiated assertion that TekSavvy's "users...fit the profile": Logan Transcript, TekSavvy Record pp. 42-43, QQ. 139-140.

<sup>11</sup> E-mail exchange between B. Logan, C. Tacit, P. Misur, October 10-16, 2012, Exhibit 1 to the Cross-examination of Barry Logan, TekSavvy Record, Tab 11(1), pp. 5-6.

<sup>12</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 12.

<sup>13</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 13 and Exhibit "A" (Tab 2A); Reasons for Order, TekSavvy Record, Tab 14, at paras. 46 and 135.

<sup>14</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 39 and Exhibits "F", "G". Voltage initially indicated willingness to work with TekSavvy on safeguards, but subsequent requests for a draft Order

- 5 -

14. TekSavvy also insisted from the outset that it be able to give notice of Voltage's motion to affected subscribers, to allow them to be aware of the issues at stake, understand how their rights could be affected, and take any steps they deemed necessary including seeking legal advice or being represented at the motion. Voltage took the position that the desire to give notice to those whose rights were affected was "without a legal basis", but agreed to postpone the motion until December 10, 2012 for the purpose. TekSavvy immediately began work on planning and implementing the correlation of the IP addresses, based on Voltage's list of 4,500 IP addresses.<sup>15</sup>

15. TekSavvy expressly advised Voltage 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."<sup>16</sup> Notwithstanding this express advice regarding the nature and cost of the information request, Voltage chose to pursue its request and its motion.

16. On November 28, 2012, nearly a month after providing the initial list of IP addresses, Voltage sent TekSavvy a revised list which, while shorter, still included 2,114 IP addresses. Voltage informed TekSavvy that it would be proceeding with its motion on December 17, 2012, and "would not be amenable to any further delays."<sup>17</sup> TekSavvy employees worked diligently to undertake the necessary correlation of Voltage's revised list, so as to identify the TekSavvy subscribers whose customer accounts had been associated with the IP addresses on the list at the time given on the list. On December 4, 2012, TekSavvy had completed this initial correlation.<sup>18</sup> As detailed below, this was a complicated and time-intensive process, the likes of which TekSavvy had never before undertaken.

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went unanswered: Gaudrault Affidavit, Exhibit "B", p. 8; see also Transcript of the Cross-Examination of John Philpott, October 9, 2014 ("Philpott Transcript"), TekSavvy Record, Tab 13, at pp. 35-37.

<sup>15</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 15-17. This initial planning and implementation was largely independent of whether there were 4,000 or 2,000 IP addresses to lookup: Cross-Examination of Marc Gaudrault, October 8, 2014 ("Gaudrault Transcript"), TekSavvy Record, Tab 5, pp. 80-81, QQ. 276-277.

<sup>16</sup> E-mail from N. McHaffie to J. Philpott, November 15, 2012, Gaudrault Affidavit, Exhibit "B", TekSavvy Record, Tab 2B, at p. 4.

<sup>17</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 18 and Exhibit "C" (Tab 2C).

<sup>18</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 11 and 19.

- 6 -

### C. TekSavvy's IP Look-Up Process

17. TekSavvy's systems create and maintain daily "RADIUS" log files of Internet access and user log-ins.<sup>19</sup> A new record—which contains IP address, customer username information, and a time stamp, among other information—is added to a log file every time a customer account is logged in, and every 10 or 15 minutes while that customer account is logged in. As a result, each daily log file has an average of 8 to 10 million records. A new RADIUS log file is created daily for each of the three RADIUS servers serving TekSavvy customer accounts logging in from Ontario.<sup>20</sup>

18. Correlating an IP address and time stamp to a customer account at a given point in time requires: locating, transferring and converting the relevant daily log files; searching them for the relevant IP address; comparing the times at which log entries were made for that IP address to the time for which the IP address correlation is requested; correlating the identified username to an account in the customer relationship management (CRM) database; and performing checks to make sure that account was active at the time and there were not multiple accounts with the same login during the time frame, as occurs regularly in such large scale systems.<sup>21</sup>

19. TekSavvy had never previously been asked to undertake the correlation of thousands of IP addresses—no private actor had asked any ISP in Canada to do so. TekSavvy had only undertaken 17 IP address correlations over the course of the prior two-year period, each undertaken by the same individual on a different occasion, each related to a single IP address, and each pursuant to a law enforcement agency's legal power in the context of a criminal investigation.<sup>22</sup> Such lookups were undertaken manually, taking between an hour and two hours per IP address.<sup>23</sup>

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<sup>19</sup> The RADIUS protocol is a means of generating large, constantly-updated text file logs of Internet user log-ins: Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 20(c).

<sup>20</sup> Transcript from the Cross-Examination of Pascal Tellier, October 8, 2014 ("Tellier Transcript"), TekSavvy Record, Tab 6, at p. 20, QQ. 77-79.

<sup>21</sup> Tellier Transcript, TekSavvy Record, Tab 6, at p. 21, Q. 81; Gaudrault Transcript, TekSavvy Record, Tab 5, at pp. 22-24, QQ. 83-88.

<sup>22</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 9-10.

<sup>23</sup> Gaudrault Transcript, TekSavvy Record, Tab 5, at pp. 22-23, QQ. 82-83; Tellier Transcript, TekSavvy Record, Tab 6, at pp. 18-19, Q. 71.

- 7 -

20. There is no business need for TekSavvy to generate historical IP address information, and TekSavvy's systems are not designed to do so, particularly for the thousands of addresses Voltage identified. Correlation of 2,100 IP addresses with time stamps covering a two-month period (and thus approximately 180 daily log files) one-by-one using TekSavvy's usual manual process would have required many thousands of hours of work. TekSavvy therefore had to plan and implement a unique approach to respond to Voltage's request, to at least partially automate the process, as this was the most efficient and least expensive way to undertake the correlation.<sup>24</sup>

21. Setting up TekSavvy's systems to do this required the involvement of many senior TekSavvy officers and staff.<sup>25</sup> Mr. Gaudrault describes the process TekSavvy undertook to identify subscribers in response to Voltage's request in his affidavit, and Mr. Gaudrault and Mr. Tellier expanded on this in their cross-examinations.<sup>26</sup> In summary, the process involved initial analysis and planning; locating, transferring and decompressing each of the relevant daily RADIUS log files; setting up a new SQL server and constantly running a script to import the log files into the SQL server;<sup>27</sup> loading that imported data into the SQL database to permit automated searches of the database; cloning TekSavvy's CRM database and attaching it to the SQL server to allow matching of user information with customer account information without it affecting the ability to use the CRM database in normal operations; designing, programming and optimizing SQL queries to do the searching and matching; building indexes to make the results of the queries retrievable; and then running the queries against each of the 2,114 unique IP address and timestamp pairs provided by Voltage.

22. Given importance of the issue and the volume of IP addresses, the search and correlation work was divided among TekSavvy employees, and was then run a second time, with the two lists compared to identify differences. Those differences were then

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<sup>24</sup> Gaudrault Transcript, TekSavvy Record, Tab 5, at p. 27, Q. 106.

<sup>25</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 19.

<sup>26</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 20; Gaudrault Transcript, TekSavvy Record, Tab 5, at QQ. 25-30, 67-71, 80-83, 95-106, 128-141, 147-151, 174-178, 194-204 and 274-276; Tellier Transcript, TekSavvy Record, Tab 6, at QQ. 52-56 and 71-84.

<sup>27</sup> SQL is a programming language designed for managing large amounts of data: Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 20(d).

- 8 -

verified and resolved so that a final list could be produced. The result was that information for approximately 1,130 customer accounts was determined.<sup>28</sup>

#### **D. Notice and Error Correction**

23. As noted, TekSavvy performed this IP address correlation and lookup process prior to Voltage's motion.<sup>29</sup> On December 10, 2012, TekSavvy sent a notice to the subscribers associated with the customer accounts it had identified, including language that Voltage requested be included in the notice. Over the next several days, TekSavvy received reports from some recipients of the notice, indicating that they had not been TekSavvy customers at the relevant time or that there were other errors in the identification of subscribers, despite TekSavvy's fail-safes and double-checks.

24. After learning that some of the subscriber identification was inaccurate, TekSavvy undertook further confirmation and verification of its information. On the night of December 16, 2012 (the day before Voltage's motion was scheduled), TekSavvy discovered that it had incorrectly notified 42 subscribers and had failed to notify an additional 92 subscribers. Thus, in addition to protecting subscribers' privacy rights, notifying its subscribers provided TekSavvy with a valuable quality-control check on the information that had been generated through the correlation of the large-scale and unprecedented IP address lookups TekSavvy had undertaken.<sup>30</sup>

#### **E. Voltage's Refusals to Adjourn and Other Procedural Steps**

25. Prior to the December 17, 2012 hearing, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") indicated that it intended to seek leave to intervene. In light of CIPPIC's intended intervention and the recently-identified errors in TekSavvy's correlation, CIPPIC and TekSavvy requested an adjournment at the hearing. The request was opposed by Voltage, but was granted by Justice O'Keefe. The motion was adjourned until January 14, 2013.<sup>31</sup>

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<sup>28</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 21.

<sup>29</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 22. As discussed below starting at para. 33, this did not affect the costs incurred by TekSavvy, which would have had to be incurred in any event.

<sup>30</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras 22-24 and Exhibit "D" (Tab 2D).

<sup>31</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 27.

- 9 -

26. On December 21, 2012, CIPPIC filed its motion for leave to intervene and sought adjournment of the January 14, 2013 date to allow the intervention motion to be determined. Voltage again opposed the request, requiring the parties, including TekSavvy, to attend on January 14, 2013, at which time the requested adjournment was granted by Justice Mandamin.<sup>32</sup>

27. On February 13, 2013, CIPPIC was granted leave to intervene. As a result, CIPPIC and Voltage filed affidavit evidence and cross-examinations were held. TekSavvy and its counsel reviewed these materials and counsel attended the cross-examinations to ensure that TekSavvy's interests were represented and protected.<sup>33</sup> The motion was ultimately heard on June 25, 2013.<sup>34</sup>

#### **F. Costs Incurred in Communicating With Customers**

28. This proceeding involves a request for an unprecedented amount of personal information, engages extensive and novel concerns about privacy and Internet anonymity, and raises the spectre of literally thousands of potential claims for infringement of copyright. As is therefore to be expected, Voltage's motion generated considerable interest and concern among TekSavvy's current subscribers (both those directly affected by the motion as identified subscribers and those who were not), potential subscribers and the general public. This resulted in a massive increase in telephone and online inquiries, comments and complaints to TekSavvy. At one point, TekSavvy was receiving 4,000 to 6,000 calls per day, of which 90 percent were related to Voltage, and had as many as 200 telephone calls in queue for response.<sup>35</sup>

29. TekSavvy employees had to spend numerous hours fielding these inquiries, instead of engaging in their ordinary business such as attending to regular customer service or sales calls. Extra overtime hours also had to be paid for to address the call volume, and senior operations management had to oversee the operational side of

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<sup>32</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 28; Order and Reasons of Justice Mandamin, January 18 and 31, 2013, TekSavvy Record, Tab 15.

<sup>33</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 29.

<sup>34</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 29; Reasons, TekSavvy Record, Tab 14.

<sup>35</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 30-31, 35-36, 49, 56 and 59; Transcript of the Cross-examination of Pierre Aubé, October 8, 2014, TekSavvy Record, Tab 7, at p. 7, QQ. 22-23.

- 10 -

responding to Voltage's request through rebuilding TekSavvy's telephone menus to address the call volume increase; forecasting and shifting workloads to handle the inquiries; and training associates to properly and accurately respond to inquiries.<sup>36</sup>

30. TekSavvy took steps to reduce the overall number of inquiries and efficiently convey accurate information. TekSavvy create an online portal tool for subscribers to confirm whether their account had been identified as being associated with one of the IP addresses on Voltage's list. (This portal at times became overloaded, with over a thousand concurrent visitors to the TekSavvy website). TekSavvy also sent an e-mail to all of its customers, advising them of the portal, and providing answers to the questions that had been most frequently asked about the Voltage motion.<sup>37</sup>

#### **G. Distributed Denial-of-Service Attack**

31. The significant attention and interest generated by Voltage's motion was also manifested in a much more negative way. TekSavvy, Voltage and Canipre were each victims of DDoS attacks, in which hackers disable a website or online business by manipulating a huge number of computers to flood a targeted host with communication requests. Given the targets (TekSavvy, Voltage and Canipre) and the timing (shortly before the first hearing was scheduled in December, 2012), it is clear that the DDoS attacks were directly related to the Voltage motion, and it was only because TekSavvy was named by Voltage that it was the subject to the attack.<sup>38</sup>

32. The DDoS attack was targeted directly at TekSavvy's website and critical infrastructure, and disrupted TekSavvy's website and internal office connectivity, resulting in another increase in call volume, lost calls and lost employee hours.<sup>39</sup> Prior to Voltage's motion, TekSavvy had never been subject to such a large targeted attack. TekSavvy's systems were not able to respond to the attack and it was therefore forced to spend time finding and implementing a solution from a third-party provider to

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<sup>36</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 56-59.

<sup>37</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 30-31; Gaudrault Transcript, TekSavvy Record, Tab 5, at pp. 60-62, QQ. 219-225.

<sup>38</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 32-33.

<sup>39</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 32. Mr. Logan recognized the impact of a DDoS attack: Logan Transcript, TekSavvy Record, Tab 11, at pp. 153-154, QQ. 588-594.

- 11 -

“harden” its defences against future DDoS attacks.<sup>40</sup>

#### **H. The Costs Would Have Been Incurred Regardless of Timing or Notice**

33. The technical and operational costs described above were incurred in the period from November, 2012 to January, 2013, prior to the ultimate hearing of the motion and thus the issuance of Prothonotary Aalto’s Order. It is important to stress that these costs would have been incurred irrespective of when they were incurred, even if TekSavvy not undertaken the correlation until after the Order was issued.<sup>41</sup>

34. The technical measures associated with performing the correlation would evidently have had to be undertaken regardless of when that correlation was done. The resulting operational need to respond to a massive increase in inquiries would similarly have been necessary in the wake of the Order’s issuance. Indeed, as Mr. Gaudrault points out, had the information come to the attention of subscribers and the public only after TekSavvy was ordered to provide personal information to Voltage—with affected and unaffected subscribers not having been informed of the existence of the proceeding, nor of the potential disclosure of personal information, until after issuance of an order—the impacts would have been considerably greater.<sup>42</sup>

35. Notably, this is not a case where Voltage’s novel request for subscriber information associated with over 2,000 IP addresses might somehow have gone “undetected” if TekSavvy had not provided notice to customers. As Mr. Gaudrault noted on cross-examination, an earlier motion by Voltage had been in the press even though it related to far fewer IP addresses, no prior notice had been given to affected subscribers, and the ISPs had not attended the hearing of the motion.<sup>43</sup>

36. The costs incurred and claimed by TekSavvy are thus not the result of TekSavvy’s insistence that identified subscribers ought to be given notice that their

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<sup>40</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 33-34.

<sup>41</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 37; Gaudrault Transcript, TekSavvy Record, Tab 5, at p. 59, Q. 215.

<sup>42</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 37.

<sup>43</sup> Gaudrault Transcript, TekSavvy Record, Tab 5, at p. 58, Q. 213; *Voltage Pictures LLC v. Doe*, 2011 FC 1024, Authorities, Tab 5, at p. 1; Affidavit of Barry Logan, sworn July 30, 2013 (“Logan Affidavit”), TekSavvy Record, Tab 8, at para. 33 and Exhibit “U”; Logan Transcript, TekSavvy Record, Tab 11, at pp. 125-126, QQ. 483-487 (undertaking given remains unanswered).

- 12 -

rights may be affected and their personal information disclosed, as Voltage apparently argues. The *timing* of the costs was different because of TekSavvy's approach to notice and its willingness to do the correlation before any Order issued, but the *incurring* of those costs and their quantum was unaffected (if anything, decreased). The claimed costs are attributable, not to TekSavvy's approach to notice, but to Voltage's motion requesting disclosure of thousands of people's personal information.

37. While ultimately irrelevant to the quantum of costs incurred by TekSavvy in abiding by the Order, it is submitted that TekSavvy's approach to notice was entirely appropriate. The *Federal Courts Rules* generally, and Rule 238 in particular, are premised on a system of providing notice to parties and those whose rights are potentially affected.<sup>44</sup> Notice allows those whose interests are before the Court to be aware of what is occurring, seek legal advice as appropriate, and respond or appear if they choose to do so. This principle has been recognized by Ontario Superior Court of Justice: "It may be that in an appropriate case the Internet service provider should be required to give notice to its customer for the purpose of enabling the customer to make submissions as to whether the order should be granted."<sup>45</sup> [emphasis added]

38. Even if an ISP is not *required* to give such notice, TekSavvy's willingness to undertake the front-end costs of conducting the correlation prior to the hearing on the *Norwich* Order, permitting those affected to have notice and information regarding the proceedings, was in keeping with the general principles of notice and open Court proceedings, and was both proper and commendable.

39. Providing prior notice and accurate information to affected subscribers reduced overall costs to TekSavvy, and thus to Voltage, and allowed for the correction of errors that were perhaps inevitable in such a massive correlation endeavour. But even had such notice increased costs, where a responding party is prepared to take on providing notice in advance of a *Norwich* Order motion, it is submitted such costs would be appropriately borne by the plaintiff requesting disclosure, here Voltage.

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<sup>44</sup> Rule 238(2), Authorities, Tab 1; *Stoney First Nation v. Shotclose*, 2011 FCA 232, Authorities, Tab 6, at paras. 9-10; *Barlow v. Canada*, [2000] FCJ No. 282 (FCT), Authorities, Tab 7 at paras. 62-63.

<sup>45</sup> *York University v. Bell Canada Ent.* (2009), 99 OR (3d) 695 (SCJ), Authorities, Tab 8, at para. 38.

- 13 -

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

#### **A. The Order for Payment of Reasonable Costs Incurred**

##### ***1) Voltage ordered to pay TekSavvy's costs of abiding by this Order***

40. 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>46</sup> [emphasis added] This term is to be read in the context of Prothonotary Aalto’s Reasons for Order, as well as the broader context of the *Norwich* Order cases that he referred to and relied on.

41. Prothonotary Aalto used expansive language in his Order, referring to “all” costs, and specifically enumerating each of legal costs, administrative costs and disbursements, rather than purporting to impose any restrictions on the nature of costs that were intended to be covered. The Reasons that Prothonotary Aalto gave for his Order provide further indication that the Order was meant to be expansive:

- (a) he stated that “TekSavvy will be reimbursed for its reasonable costs in providing the information”;
- (b) he noted that as a consideration flowing from cases in the US, UK and Canada, the “party enforcing the *Norwich* Order should pay the legal costs and disbursements of the innocent third party”;
- (c) he stated that the terms of the Order were designed so “production of such information will not ... cause expense to TekSavvy or others”;
- (d) he 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) using the same language found in the Order, he 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>47</sup>

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<sup>46</sup> Order, TekSavvy Record, Tab 14, at p. 56, para. 3.

<sup>47</sup> Reasons, TekSavvy Record, Tab 14, at para. 46, 134-136, 138.

- 14 -

**2) Indemnification in Norwich Orders generally**

42. Beyond the broad inclusion of “all reasonable legal costs, administrative costs and disbursements”, Prothonotary Aalto gave no definition of what specific costs would be included in the term (having heard neither evidence nor argument on the issue). Importantly, though, Prothonotary Aalto made his order in the context of a thorough review of Canadian, English and American jurisprudence on *Norwich* Orders, and gave no indication that his Order as to costs was intended to be anything other than an order addressing the principles of reimbursement and indemnification set out in those cases. Consideration of those cases is thus helpful in determining the scope of the costs Order in the present case.

43. In the eponymous *Norwich* case, the House of Lords described the indemnification principle 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>48</sup> [emphasis added]. Similarly, in the leading Canadian case of *BMG*, to which Prothonotary Aalto made extensive reference, the Federal Court of Appeal affirmed the motion Court’s statement that “the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs”.<sup>49</sup> [emphasis added] Prothonotary Aalto made specific reference to the principles to be taken from *BMG* as including that “any order made will not cause undue delay, inconvenience or expense to the third-party or others”.<sup>50</sup>

44. In the recent Ontario Court of Appeal decision in *Stewart*, which also involved IP addresses and was also referenced by Prothonotary Aalto, the Court affirmed the trial judge’s decision that the third party should be compensated for “any costs of disclosure.”<sup>51</sup>

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<sup>48</sup> *Norwich, supra*, Authorities, Tab 2, at para. 100.

<sup>49</sup> *BMG (FCA), supra*, Authorities, Tab 3, at para. 35, aff’ing *BMG (FC), supra*, Authorities, Tab 4, at paras. 10(d) and 32.

<sup>50</sup> Reasons, TekSavvy Record, Tab 14, at para. 45(e).

<sup>51</sup> *1654776 Ontario Limited. v. Stewart*, 2013 ONCA 184, Authorities, Tab 9, at paras. 25 and 76, aff’ing 2012 ONSC 1991, leave to appeal refused, 2013 CanLii 59893.

- 15 -

45. Although not referenced by Prothonotary Aalto in his reasons, the Alberta Queen’s Bench in *Leahy* also surveyed both Canadian and English law and determined that “the Court will consider the following factors on an application for *Norwich* relief...(iv) [w]hether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure”.<sup>52</sup> [emphasis added]

46. As Prothonotary Aalto noted, a *Norwich* Order permitting examination of a non-party to litigation under Rule 238 is a “discretionary and extraordinary order”.<sup>53</sup> Such an order compels a third party to incur costs in respect of a proceeding to which it is not otherwise a party, and over which the third party has little control. Recognizing the unfairness of foisting such costs on an innocent third party, Courts have consistently ordered the party seeking to examine the third party to indemnify that third party for its reasonably incurred costs.

**3) *The Costs of “abiding by this Order” are not limited to post-Order costs nor to technical costs of correlation***

47. To anticipate an argument that may be made by Voltage, Prothonotary Aalto’s reference to the costs of “abiding by this Order” cannot be taken to limit TekSavvy’s recoverable costs to those incurred after the Order was issued in February of this year.

48. Prothonotary Aalto was fully aware that TekSavvy had already undertaken the correlation of IP addresses to subscriber information, such that the cost of simply sending that information to Voltage would be trivial. Prothonotary Aalto’s repeated reference to the principles of indemnity described above belie any suggestion that his costs order was intended to be a *de minimis* one. Such an approach would also conflict with Prothonotary Aalto’s recognition and inclusion of “reasonable legal costs” and “disbursements”, of which there would be effectively none associated with merely sending the previously correlated information to Voltage.

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<sup>52</sup> *Alberta Treasury Branches v. Leahy*, 2000 ABQB 575, Authorities, Tab 10, at para. 106, aff’d in *Alberta Treasury Branches v. Ghermezian*, 2002 ABCA 101, Authorities, Tab 11. The Orders in question provided that “reasonable fees incurred in complying with the order[s]” would be paid: *Leahy*, *supra*, Authorities, Tab 10, at para. 159.

<sup>53</sup> Reasons, TekSavvy Record, Tab 14, at para. 35. See also *Temelini v. Royal Canadian Mounted Police Commissioner*, [2009] OJ No 4447 (Ont SCJ), Authorities, Tab 12, at para. 18.

- 16 -

49. Limiting the costs of abiding by the Order to trivial post-Order delivery costs would also be inconsistent with the term of the Order that the “reasonable legal costs and disbursements of TekSavvy ... shall be paid prior to the release” of the customer information requested by Voltage.<sup>54</sup> That term was included at TekSavvy’s request in part to address the concern that Voltage, a foreign company, could obtain the information it sought and then have no incentive to pay what were already known (and referred to in the hearing before Prothonotary Aalto) to be significant costs.

50. There is also no indication that Prothonotary Aalto intended to limit his Order to solely the technical costs of correlation and, in fact, every indication that he did not. Prothonotary Aalto could have restricted the scope of the Order and specified that Voltage only had to pay TekSavvy the costs of correlating the names of its customers or the costs of attendance at the motion. Instead, Prothonotary Aalto broadly defined the costs to which TekSavvy was entitled, referring to both “reasonable legal costs” and “administrative costs” as headings separate from “disbursements”.

**4) *The costs incurred by Voltage as claimed are captured by the Order***

51. Prothonotary Aalto’s Order, his Reasons, and the underlying jurisprudence all support the proposition that the costs to which TekSavvy is entitled should not be defined so as to narrow them. All of the costs claimed by TekSavvy were incurred solely as a result of Voltage’s motion and would not have been incurred but for that motion. In the words of the Alberta Court of Queen’s Bench in *Leahy*, they are “costs to which [TekSavvy was] exposed because of the disclosure”.<sup>55</sup>

52. To be clear, even full reimbursement of these claimed costs will not fully indemnify TekSavvy for its costs incurred as a result of Voltage’s motion. But the claimed costs, described in further detail below, are all costs incurred by TekSavvy in responding to the motion and obtaining the information for provision to Voltage, and thus in abiding by the *Norwich* Order of Prothonotary Aalto. The only remaining question is therefore whether those costs are “reasonable”.

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<sup>54</sup> Order, TekSavvy Record, Tab 14, at p. 56, para. 4.

<sup>55</sup> *Leahy, supra*, Authorities, Tab 10, at para. 106.

- 17 -

## **B. TekSavvy's Costs are Reasonable**

53. The costs set out in TekSavvy's Bill of Costs fall within the three categories identified by Prothonotary Aalto: legal costs, administrative costs, and disbursements. Within each of these categories, there are two subcategories. TekSavvy's **legal costs** include those of (i) its special counsel Stikeman Elliott LLP, and (ii) its corporate counsel Christian Tacit. Its **administrative costs** include (i) technical costs associated with the lookup, correlation and verification of the IP addresses and customer information, and (ii) operational costs associated with responding to the massive increase in customer and public inquiries and comments. And its **disbursements** include (i) the disbursements of Stikeman Elliott, and (ii) measures taken to harden TekSavvy's system in the wake of the DDoS attack described above.

54. The reasonableness of each of these categories of costs is addressed below. As an introductory matter, TekSavvy submits that, having undertaken to pay TekSavvy's reasonable costs, Voltage should not be permitted to engage in *ex post facto* second-guessing of the way TekSavvy undertook the correlation exercise, or the way it conducted its business to respond to the difficult position that Voltage had put it in. As stated by the Ontario Superior Court in the context of an award of experts' costs:

It is not appropriate to apply the test of hindsight (20/20 vision) to determine whether a service charged for was an extra service or frill not reasonably necessary...The time to view the decision to commit services to the project is before the hearing or trial – not on the basis of hindsight which might indicate that as it turned out, the advice was unnecessary.<sup>56</sup> [Emphasis added]

### **1) Legal Costs**

55. The order to pay "all reasonable legal costs" of TekSavvy is not a typical order of costs as might be made under Rule 400, but a special requirement in the context of a *Norwich* Order to indemnify the innocent third party in respect of the costs it was put to by virtue of the request for information. The term is thus used in the same manner

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<sup>56</sup> *Apotex Inc. v. Egis Pharmaceuticals*, [1991] OJ No 1232 (Gen Div), Authorities, Tab 13, at para. 34. A similar sentiment has been expressed by the Federal Court: "...indemnification of disbursements is not a function of hindsight 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..." (emphasis added): *Janssen Inc. v. Teva Canada Ltd.*, 2012 FC 48, Authorities, Tab 14, at para. 68.

- 18 -

as it was described by the Ontario Superior Court of Justice in *Fontaine*:

The term “reasonable legal costs” [as used in the Indian Residential Schools national settlement agreement]...does not 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.<sup>57</sup> [emphasis added]

56. As described by Mr. Gaudrault and detailed in TekSavvy’s Bill of Costs, the legal costs incurred by TekSavvy in obtaining advice on its rights, obligations and options in response to Voltage’s motion, its communications with customers and the public, and representation in preparation for and attendance at the hearings in the matter, were significant.<sup>58</sup> This is not itself surprising, given that this was the first time that a similar request of this magnitude had been brought in Canada, raising clear issues of privacy, concerns about “speculative invoicing or copyright trolling”, mass copyright litigation, the balancing of Internet users’ and copyright holders’ interests, and differing views regarding the role of an ISP in the process.<sup>59</sup>

57. TekSavvy was generally represented by Christian Tacit. In light of the nature of Voltage’s motion, TekSavvy retained Stikeman Elliott to provide advice regarding privacy and intellectual property issues and to represent TekSavvy on the motion.<sup>60</sup>

a) Costs of Stikeman Elliott LLP

58. A detailed task breakdown and full supporting invoices and ledgers in respect of Stikeman Elliott’s advice to TekSavvy is provided in TekSavvy’s Bill of Costs. It is submitted that these costs are “reasonable legal costs”, being both objectively reasonable in light of the nature of the motion brought, and considered reasonable by TekSavvy as the business that retained and paid for the advice.<sup>61</sup>

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<sup>57</sup> *Fontaine v. Canada (Attorney General)*, 2012 ONSC 3552 (Ont SCJ), Authorities, Tab 15, at para. 7.

<sup>58</sup> Mr. Gaudrault addresses the legal costs incurred by TekSavvy at paras. 35-36 and 40-48 of his affidavit, TekSavvy Record, Tab 2.

<sup>59</sup> Reasons, TekSavvy Record, Tab 14, at opening quote and paras. 1, 6, 35, 37, 41-43, 54, 57-60, 102-110, 117-120, 129 and 133; Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 41; Logan Transcript, TekSavvy Record, Tab 11, at pp. 151-153, QQ. 583-588.

<sup>60</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 14.

<sup>61</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 43.

- 19 -

b) Costs of Christian Tacit

59. Mr. Tacit works on a retainer for TekSavvy. He therefore does not have individual time ledgers associated with the work undertaken or advice given in respect of Voltage's motion. Nonetheless, Mr. Tacit was fully engaged in the matter, including providing advice, attending the hearings as co-counsel, and continuing to act in his role TekSavvy's regular counsel providing advice on customer communications, IT issues, call-centre issue and privacy matters.<sup>62</sup> Mr. Tacit provided Mr. Gaudrault with a best estimate of his costs in providing advice in respect of Voltage's motion by attributing portions of his monthly retainers to Voltage in accordance with the amount of work he did in response to Voltage's motion in that month.<sup>63</sup> Neither Mr. Tacit's representation, nor his cost breakdown, was in any way challenged on cross-examination. Again, these costs are "reasonable legal costs", being both objectively reasonable in light of the nature of the motion brought, and considered reasonable by TekSavvy as the business that retained and paid for the advice.<sup>64</sup>

c) Response to Voltage's responding evidence regarding legal costs

60. Voltage, through the affidavit of its counsel, John Philpott, attacks a number of actions on the part of TekSavvy, apparently arguing that TekSavvy (or its counsel) unreasonably drove up costs. The criticisms raised by Mr. Philpott are unfounded.

61. First, TekSavvy did not "force" Voltage to bring its Rule 238 motion.<sup>65</sup> The motion was brought voluntarily by Voltage. Mr. Philpott's claim runs contrary to Prothonotary Aalto's conclusion that TekSavvy acted "quite properly" in not providing information without a court order.<sup>66</sup> It also runs contrary to the provisions of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*, and to the recent confirmation by the Supreme Court of Canada in *Spencer* that a production order or warrant must be obtained before subscriber information correlated to an IP

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<sup>62</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 12-14, 40-41 and 44-46.

<sup>63</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 44-46, Exhibits "H" and "I" (Tabs 2H and 2I)

<sup>64</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 43.

<sup>65</sup> Affidavit of John Philpott, sworn July 31, 2014 ("Philpott Affidavit"), TekSavvy Record, Tab 10, at paras. 5-6.

<sup>66</sup> Reasons for Order, TekSavvy Record, Tab 14, at paras. 46 and 135.

- 20 -

address is provided.<sup>67</sup> It even runs contrary to this Court's conclusion in the earlier case brought by Voltage itself, that "the internet service providers cannot disclose the names and address of their customers without an order of this Court."<sup>68</sup>

62. Second, TekSavvy was a party to the litigation,<sup>69</sup> having been identified expressly as the responding party in Voltage's motion. Having so named TekSavvy, it does not lie in the mouth of Voltage to assert that TekSavvy did not need legal counsel to fully represent its interests. Such an assertion conflicts with the *Norwich* Order cases that provide for indemnity for legal costs, including *Norwich* itself ("full costs") and *BMG* ("in addition to its legal costs"). In any event, this position is contrary to Prothonotary Aalto's express order that Voltage pay "all reasonable legal costs".

63. Third, the December 17 and January 14 dates were adjourned on the basis of CIPPIC's intervention request.<sup>70</sup> TekSavvy considered CIPPIC's adjournment requests reasonable and supported them, but CIPPIC made the requests and the Court granted them on that basis.<sup>71</sup> TekSavvy cannot be condemned for consenting to or supporting reasonable adjournment requests (granted by the Court), opposed by Voltage, nor for attending at the hearings that might have gone ahead had they not been adjourned.

64. Finally, Mr. Philpott's assertion that "TekSavvy had no involvement in" the hearing of the motion before Prothonotary Aalto is simply incorrect. TekSavvy appeared and, having attempted to earlier obtain a draft Order from Voltage prior to the motion, made submissions regarding terms of the Order, so as to protect the personal information of its subscribers and protect them from potential abuses often associated with mass copyright cases.<sup>72</sup> Contrary to Mr. Philpott's assertion that TekSavvy "did not make any material submissions", many of TekSavvy's submissions

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<sup>67</sup> *R. v. Spencer*, 2014 SCC 43, Authorities, Tab 16, at paras. 11-12, 50-51, 61-66 and 70-74.

<sup>68</sup> *Voltage v. Doe (2011)*, *supra*, Authorities, Tab 5, at para. 22.

<sup>69</sup> Philpott Affidavit, TekSavvy Record, Tab 10, at paras. 10 and 39.

<sup>70</sup> Philpott Affidavit, TekSavvy Record, Tab 10, at paras. 27-30 and 32-33.

<sup>71</sup> As Mr. Philpott points out, TekSavvy's request for an adjournment of the first hearing date on the basis of the notice issue and errors in the initial correlation was not ultimately addressed by the Court.

<sup>72</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 39. Mr. Gaudrault was not cross-examined on this point. TekSavvy is surprised that this is in issue, but notes that the recording of the hearing is on the record of this Honourable Court in this file.

- 21 -

are reflected materially in the terms of the Order, and Prothonotary Aalto specifically noted that “Counsel for TekSavvy helpfully put in perspective the issues TekSavvy has with respect to revealing information...”<sup>73</sup>

65. It is therefore submitted that the costs of Stikeman Elliott and the costs of Christian Tacit as filed with the Bill of Costs are reasonable legal costs incurred in abiding by the Order as captured by paragraph 3 of Prothonotary Aalto’s Order, and ought to be paid by Voltage.

**2) Administrative Costs**

66. Voltage’s motion had a significant administrative impact on TekSavvy, requiring TekSavvy employees to dedicate numerous hours to both undertaking the requested correlation and addressing associated issues with customers and the public. As Mr. Gaudrault noted, at times “effectively everyone in the company was occupied with responding to and addressing the motion brought by Voltage.”<sup>74</sup>

67. Voltage was advised at the outset that the correlation would be “a substantial undertaking for TekSavvy and one to which it will have to dedicate significant resources away from the operations of its business.”<sup>75</sup> It chose to proceed and give an undertaking as to costs nonetheless. It may be that owing to TekSavvy’s size and the fact that it had not received numerous correlation requests in the past, its costs of responding to Voltage’s unique motion were higher than they might have been for another, larger ISP. However, this is simply a result of Voltage and Canipre’s deliberate tactical decision to target TekSavvy given its smaller size.<sup>76</sup> The reasonableness of the costs must be assessed from the perspective of the responding party named by the plaintiff. The plaintiff can hardly complain that costs are too high because the party it targeted has a different technical or cost structure than another that it chose not to target.

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<sup>73</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 39; Reasons, TekSavvy Record, Tab 14, at para. 136.

<sup>74</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at para. 51.

<sup>75</sup> E-mail from N. McHaffie to J. Philpott, November 15, 2012, Gaudrault Affidavit, Exhibit “B”, TekSavvy Record, Tab 2(B), at p. 4.

<sup>76</sup> Logan Transcript, TekSavvy Record, Tab 11, at pp. 46-48, QQ. 160-165.

- 22 -

68. The administrative costs of TekSavvy fall into two general areas. The first is the technical costs associated with the correlation, including the process design, the initial correlation, the notice that acted as a fail-safe, and the secondary corrected correlation. The second is the operational costs associated with responding to the interest and concern on the part of affected subscribers, other subscribers and the public, as reflected in the massive increase in telephone and online inquiries, and in public and online commentary on the situation and TekSavvy's response to it. In each case, the claimed administrative costs reflect hours spent by TekSavvy employees, including senior employees, dedicated to the Voltage motion that would otherwise have been spent on TekSavvy's business (and, in the case of operational costs, some additional overtime costs that also would not otherwise have been incurred).

a) Technical Costs

69. TekSavvy's technical costs incurred in responding to Voltage's motion are fully described in TekSavvy's Bill of Costs and supporting evidence, and are summarized above. These technical costs of correlating the IP addresses are reasonable administrative costs that would not otherwise have been incurred by TekSavvy and are appropriately paid by Voltage pursuant to para. 3 of the Order.

70. TekSavvy employees were asked to and did record their time dedicated to responding to Voltage. These hours are fully itemized and substantiated in the Gaudrault and Tellier Affidavits and the appendices to them.<sup>77</sup> Nothing on cross-examination in any way called into question or undermined this evidence. In particular, the fact that TekSavvy's employees did not keep timesheets specifically detailing the time they spent working on these matters is not surprising given the circumstances, time pressures and the fact that the employees in question are salaried. In any event, TekSavvy's sworn affidavit evidence from senior employees provides clear and sufficient evidence as to the amount of time they and those directly under their supervision spent working on matters related to Voltage's motion.

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<sup>77</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 20-26, 53, 54 and Appendix "A"; Affidavit of Pascal Tellier, sworn June 27, 2014, TekSavvy Record, Tab 3, at paras. 2-6 and Appendix "A".

- 23 -

71. Further, the fact that TekSavvy's employees are salaried does not mean that there were no incremental administrative costs to TekSavvy as a result of Voltage's motion. TekSavvy employees responding to Voltage's request are necessarily not attending to their normal duties. Employees so engaged cannot respond to other customer inquiries or technical assistance requests, and cannot make sales. It is submitted that this is recognized by the very fact that Prothonotary Aalto's Order requires payment of "administrative costs" as, by definition, something different than out-of-pocket "disbursements".

b) Operational Costs

72. TekSavvy also incurred significant operational costs in responding to Voltage's motion and thus in abiding by the Order. Again, the specifics of these costs are set out in TekSavvy's Bill of Costs and supporting evidence,<sup>78</sup> and are summarized above. These technical costs of correlating the IP addresses are reasonable administrative costs that would not otherwise have been incurred by TekSavvy and are appropriately paid by Voltage pursuant to para. 3 of the Order.

73. The calculation of these operational administrative costs was somewhat different than the technical administrative costs. As with the technical costs, time spent by Senior Operations Management (Mr. Aubé and three of his group) and the marketing group (Ms. Furlan and Mr. Handsor) were tracked and recorded. In addition, to assess the administrative costs associated with the e-services and telephone contact centre, TekSavvy analyzed the increase in phone and electronic inquiry volume in response to the Voltage motion (compared to a baseline of typical volumes). Overtime hours at the call centre attributable to the Voltage motion were also included. These amounts were totaled in the Appendix prepared by Mr. Aubé, COO of TekSavvy, and were not shaken on cross-examination.<sup>79</sup>

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<sup>78</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 30-36, 56-59 and Appendix "B"; Aubé Affidavit, TekSavvy Record, Tab 3, at paras. 2-7 and Appendix "A".

<sup>79</sup> Transcript of the Cross-examination of Pierre Aubé, October 8, 2014, TekSavvy Record, Tab 7.

- 24 -

74. The fact that these operational costs were not undertaken by those who directly correlated the IP addresses does not make them any less “administrative costs ... incurred by TekSavvy in abiding by this Order”. To the contrary, they were incurred by TekSavvy specifically because of Voltage’s motion, in order to avoid even greater impact on TekSavvy’s business and reputation.<sup>80</sup> If they were to be excluded from the scope of Prothonotary Aalto’s *Norwich* Order, the result would be that TekSavvy, as an innocent third party, would have been put in a position of having to incur significant costs associated with the request to assist Voltage in its litigation, with no way whatsoever to recover those costs. This would be contrary to the basic principles of *Norwich* orders, which require that the responding party not be put to “undue ... inconvenience or expense”,<sup>81</sup> and ought to be “indemnified for costs to which the third party may be exposed because of the disclosure”.<sup>82</sup>

c) Response to Voltage’s responding evidence regarding administrative costs

75. Voltage has tendered three affidavits that seek to challenge the reasonableness of the costs incurred by TekSavvy. The first is an expert affidavit of Steve Rogers, owner of a company that conducts computer forensic analysis, addressing “the process and procedures undertaken by [TekSavvy] in fulfilling its requirements to provide subscriber information.” The second is the affidavit of Mr. Logan of Canipre, who addresses the “cost of identifying customers based on IP addresses” and criticizes TekSavvy’s business generally. The third is the affidavit of Voltage’s counsel, Mr. Philpott, who in addresses aspects of legal costs as set out above, the issue of notice and the timing (and thus, presumably, the costs) of the IP address correlation.

76. None of the evidence put forward by Voltage in any way undermines the evidence of TekSavvy as to its costs incurred and put forward in its Bill of Costs. Much of the evidence is inadmissible and/or irrelevant. The remainder is unhelpful and does not establish that any costs incurred by TekSavvy were unreasonable.

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<sup>80</sup> Gaudrault Affidavit, TekSavvy Record, Tab 2, at paras. 30, 36.

<sup>81</sup> Reasons, TekSavvy Record, Tab 14, at para. 45(e).

<sup>82</sup> *Leahy, supra*, Authorities, Tab 10, at para. 106.

- 25 -

(i) Mr. Rogers' evidence is inadmissible and unhelpful

77. Mr. Rogers is put forward as an expert, purporting to give opinion as to the steps taken by TekSavvy, and criticizing the amount of time spent by TekSavvy in conducting the correlation. It is submitted that Mr. Rogers' affidavit does not satisfy any of the criteria for admissibility of expert evidence, as set out in *R. v. Mohan*:<sup>83</sup>

(a) Mr. Rogers' evidence is not relevant. Mr. Rogers addresses how his business might have addressed the issue, but he did not attempt to undertake an equivalent correlation himself, nor did he start from assumptions that reflected TekSavvy's reality or any knowledge of its infrastructure, policies or systems.<sup>84</sup> Mr. Rogers further conceded that his opinion was based on incorrect assumptions, e.g., an assumption that TekSavvy's process for responding to Voltage's request was the same as that used for earlier requests from law enforcement.<sup>85</sup> Mr. Rogers admitted that many of his criticisms of Mr. Gaudrault's affidavit had no bearing on the costs at issue on this assessment.<sup>86</sup> He also admitted that one of the examples he provided to the Court as to what TekSavvy could have done instead (using IAS Log Viewer) was, in addition to something he was not familiar with, not in fact reflective of what he would have done. He would have used an SQL server, as TekSavvy did.<sup>87</sup>

(b) Mr. Rogers' evidence is not necessary to assist the trier of fact. While in theory an expert could provide some assistance to the Court in understanding the reasonableness of the time taken by TekSavvy to complete certain technical steps, the nature of Mr. Rogers' evidence provides no assistance to the Court. How another ISP would have conducted the search on its own systems (or how a forensic investigation company would do it on a complex database system that took ten years to set up<sup>88</sup>) has no bearing on

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<sup>83</sup> *R. v. Mohan*, [1994] 2 SCR 9, Authorities, Tab 17, at p. 20.

<sup>84</sup> Transcript of the Cross-examination of Steve Rogers, October 9, 2014 ("Rogers Transcript"), TekSavvy Record, Tab 12, at pp. 19-20, Q. 54; p. 31, Q. 93; pp. 55-56, Q. 167-168; p. 77, QQ. 250-251; and p. 84, Q. 276.

<sup>85</sup> Rogers Transcript, TekSavvy Record, Tab 12, at pp. 39-40, QQ. 111-115 and pp. 58-59, Q. 179. As indicated in this passage, Mr. Rogers' report was based on information known at the time and assumptions made in consequence, which he subsequently learned were incorrect through attendance at the cross-examination of TekSavvy's witnesses.

<sup>86</sup> Rogers Transcript, TekSavvy Record, Tab 12, at pp. 27-35, QQ. 76-103.

<sup>87</sup> Rogers Transcript, TekSavvy Record, Tab 12, at pp. 60-61, QQ. 182-188.

<sup>88</sup> Rogers Transcript, TekSavvy Record, Tab 12, pp. 6-7, QQ. 9-13.

- 26 -

whether TekSavvy acted reasonably in responding to Voltage's request. It is simply not helpful for the Court to have Mr. Rogers' opinions on how a hypothetical process totally unrelated to the actual circumstances might have unfolded, when considering TekSavvy's actual costs.

(c) Mr. Rogers' evidence is "otherwise excluded". Mr. Rogers' report is founded in considerable part on hearsay from unidentified sources. He admitted that he does not have any personal working knowledge of certain subjects of discussion in his affidavit (e.g., how to optimize an SQL query), but instead relies on employees to perform such operations.<sup>89</sup> Similarly, Mr. Rogers' definition of a RADIUS file is simply copied straight from Wikipedia,<sup>90</sup> and he quoted from a news article by Prof. Geist about IP address correlation without any familiarity with the documents the article relied on.<sup>91</sup>

(d) Mr. Rogers is not a properly qualified expert. Finally, and most importantly, Mr. Rogers does not have the requisite expertise necessary to provide his opinion, and it ought therefore to be disregarded. Mr. Rogers admitted that he has no experience managing an ISP, does not know how data is arranged or stored by ISPs, has not managed a SQL database, does not and cannot program SQL scripts, and is not familiar with RADIUS files.<sup>92</sup> The cumulative effect of these admissions is to render Mr. Rogers' opinion unreliable. This is not to suggest that Mr. Rogers could not provide expert evidence on a different subject, but for the matter at hand he is unsuitable.

78. It is therefore submitted that Mr. Rogers' report ought to be ignored by this Honourable Court. In any case, the evidence of TekSavvy's witnesses, intimately familiar with their own systems and data structures and how to most efficiently undertake the correlation with the resources available, ought to be preferred. Voltage's affiant, Mr. Logan, put it best when he stated plainly that "[n]obody would know TekSavvy's systems better than TekSavvy."<sup>93</sup>

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<sup>89</sup> Rogers Transcript, TekSavvy Record, Tab 12, pp. 26-27, QQ. 71-75.

<sup>90</sup> Rogers Transcript, TekSavvy Record, Tab 12, p. 50, Q. 150.

<sup>91</sup> Rogers Transcript, TekSavvy Record, Tab 12, pp. 40-41, QQ. 117-120; p. 43, Q. 124; p. 45, QQ. 126-138; p. 46, Q. 141; and pp. 49-50, QQ. 146-149.

<sup>92</sup> Rogers Transcript, TekSavvy Record, Tab 12, pp. 40-41, QQ. 117-120; p. 43, Q. 124; p. 45, QQ. 126-138; p. 46, Q. 141; and pp. 49-50, QQ. 146-149.

<sup>93</sup> Logan Transcript, TekSavvy Record, Tab 11, at p. 101, Q. 392.

- 27 -

(ii) Mr. Logan's criticisms are irrelevant, unsupported and unhelpful

79. Mr. Logan was not tendered as an expert by Voltage. Nor could he have been.<sup>94</sup> As a result, Mr. Logan, a fact witness, is prohibited from offering opinion evidence. Yet despite testifying that he was aware of this limitation, Mr. Logan repeatedly and improperly provided opinion evidence throughout his affidavit and on cross-examination.<sup>95</sup> For example, the first section of Mr. Logan's affidavit provides statements related to Internet-based piracy that are improper opinion evidence, are hearsay statements based on reports not authored by Mr. Logan and of which he has insufficient knowledge, and are in any event irrelevant to the issue before the Court, namely the costs incurred by TekSavvy in abiding by the *Norwich* Order.<sup>96</sup>

80. Mr. Logan goes on to directly attack TekSavvy's business, trying to draw a link between TekSavvy's marketing and the encouragement of online piracy.<sup>97</sup> Again, such allegations have no bearing on TekSavvy's costs of abiding by the Order, which Voltage is ordered to pay. Had Voltage wished to suggest that TekSavvy's costs should not be paid owing to its alleged complicity in piracy, it should have brought evidence of that before Prothonotary Aalto and argued that this Court was wrong to have found, in *BMG*, that "[g]iven that the ISPs are in no way involved in any alleged infringement, they would need to be reimbursed for their reasonable costs for furnishing the names of account holders, as well as the legal costs of responding to this motion."<sup>98</sup> Voltage did not bring such evidence, nor make such arguments. Instead, it undertook to pay TekSavvy's costs and Prothonotary Aalto ordered them paid, but Voltage now seeks to avoid or reduce them based on unsubstantiated and irrelevant insinuations regarding TekSavvy's business.

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<sup>94</sup> There are various reasons why Mr. Logan would not have been qualified had he been proffered, including, *inter alia*, a failure to execute the Expert Witness Code of Conduct; a lack of impartiality; and a lack of expertise regarding the areas in question.

<sup>95</sup> Logan Transcript, TekSavvy Record, Tab 11, at pp. 3,4 and 126, QQ. 4-6 and 488-489.

<sup>96</sup> Logan Affidavit, TekSavvy Record, Tab 8, at paras. 2-8; Logan Transcript, TekSavvy Record, Tab 11, at p. 4, Q. 6; pp. 7-11, QQ. 15-22; and pp. 13-14, QQ. 31-37.

<sup>97</sup> Logan Affidavit, TekSavvy Record, Tab 8, at paras. 13-22. Mr. Logan's criticism of TekSavvy became more vocal on cross-examination, when he accused TekSavvy of being a "pirate haven", again claiming this was not an opinion but based on "fact": Logan Transcript, pp. 55-56, QQ. 194-196.

<sup>98</sup> *BMG (FC)*, *supra*, Authorities, Tab 4, at para. 35.

- 28 -

81. In any case, Mr. Logan's critical opinions of TekSavvy are unfounded. Mr. Logan based his contention that "TekSavvy is the Ideal Environment to Download Movies through the BitTorrent Protocol" on the fact that TekSavvy advertises that a movie is 700 MB, offered unlimited packages, and opposed throttling. Even taken at face value, these facts do not support Mr. Logan's conclusions. However, Mr. Logan had to concede on cross-examination that (a) 700 MB is simply a generally-accepted average size for a movie file; (b) other ISPs use this reference point to explain Internet packages; (c) he had incorrectly attributed to a TekSavvy representative a bulletin board statement clearly made by an unidentified user; (d) he was not aware of whether other ISPs offered unlimited plans; (e) throttling is not directed entirely or exclusively at file sharing; and (f) it is "perfectly legal to use Multilink PPP".<sup>99</sup>

82. Similarly, Mr. Logan based his assertion that "TekSavvy Customers Openly Use TekSavvy to Download Films" on a series of exhibited "user forum" conversations, claiming they show TekSavvy's "knowing facilitation of downloading activities from Torrent sites".<sup>100</sup> However, on cross-examination, Mr. Logan was forced to admit that, as is clear from the face of the exhibits he attached, none of them even discuss downloading films, let alone from Torrent sites.<sup>101</sup>

83. Mr. Logan's affidavit then purports to speak to the cost of identifying customers based on IP addresses.<sup>102</sup> In doing so, Mr. Logan again improperly gives opinion evidence, based on hearsay information about which he had little direct knowledge, which is inapplicable or irrelevant to TekSavvy, and is in some cases simply erroneous.<sup>103</sup> Mr. Logan's lack of credibility is underscored by his contention, in the absence of any evidence, that TekSavvy may have been able to process the IP

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<sup>99</sup> Logan Transcript, TekSavvy Record, Tab 11, pp. 18-24, QQ. 51-69; pp. 38-42, QQ. 126-137; and pp. 49-51, QQ. 169-177..

<sup>100</sup> Logan Affidavit, TekSavvy Record, Tab 8, at para. 19.

<sup>101</sup> Logan Transcript, TekSavvy Record, Tab 11, at pp. 52-64, QQ. 182-228.

<sup>102</sup> Logan Affidavit, TekSavvy Record, Tab 8, at paras. 23-38.

<sup>103</sup> Logan Transcript, TekSavvy Record, Tab 11, at p. 74, QQ. 275-277; pp. 84-85, QQ. 322-324; p. 87, Q. 338; pp. 93-95, QQ. 365-368; and pp. 122-125, QQ. 470-482. Curiously and, it is submitted, improperly, Mr. Logan again contacted TekSavvy directly on the eve of cross-examinations, at the express request of counsel for Voltage: Logan Transcript, TekSavvy Record, Tab 11, at pp. 79-80, QQ. 297-299.

- 29 -

addresses “potentially in less than an hour”.<sup>104</sup> Mr. Logan admitted that this statement makes the serious accusation that Messrs. Gaudrault and Tellier are not telling the Court the truth in their affidavits, yet also admitted that this was merely speculation.<sup>105</sup>

84. It is submitted that no helpful evidence of the reasonableness of TekSavvy’s actual costs in abiding by the Order can be drawn from Mr. Logan’s unreliable second-hand evidence regarding other ISPs’ costs of conducting correlations.

*(iii) The time period between receipt of Voltage’s list and the correlation*

85. Voltage in its evidence reiterates that it only took “four business days” to convert the list (sometimes simply referring to “four days”), in an effort to minimize the effort undertaken by TekSavvy. This calculation ignores both the intervening weekend and the November 28 and December 4 dates on which the list was received by TekSavvy and completed. In any event, the number of days in which the work was completed is ultimately irrelevant. What is relevant is the amount of work that was completed in that time and the expense that was incurred as a result.<sup>106</sup>

**3) Disbursements**

86. TekSavvy’s disbursements fall into two subcategories: the disbursements of Stikeman Elliott and a disbursement incurred to harden TekSavvy’s systems in the wake of the DDoS attack. Each subcategory covers out-of-pocket expenses only incurred because of Voltage’s actions.

87. The disbursements incurred by Stikeman Elliott on behalf of TekSavvy are set out in the detailed Bill of Costs and it is submitted are reasonable. The disbursement incurred in respect of protecting against DDoS attacks was similarly a cost to which TekSavvy was exposed only by virtue of having been named by Voltage in its motion. As an ISP, TekSavvy is particularly vulnerable to such disruption, and reliable service for its customers is essential. TekSavvy reasonably and appropriately took steps to

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<sup>104</sup> Logan Affidavit, TekSavvy Record, Tab 8, at para. 38.

<sup>105</sup> Logan Transcript, TekSavvy Record, Tab 11, at pp. 126-130, QQ. 490-504.

<sup>106</sup> TekSavvy’s evidence is that the amount of work would have been the same regardless of how many days were taken to do it in: Gaudrault Transcript, TekSavvy Record, Tab 5, at pp. 78-81, QQ. 274-277.

ensure that its business would not be further disrupted by the fact that Voltage had brought it into this litigation through the request for customer account information. Having exposed TekSavvy to such disruption, it is entirely appropriate for Voltage to be called upon to pay for the costs thereof as part of its undertaking to compensate TekSavvy for its reasonable costs.

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

88. Having made the tactical decisions to pursue TekSavvy's subscribers and to undertake to indemnify TekSavvy for its costs in order to obtain information, Voltage must now bear the costs of those decisions. Prothonotary Aalto's order requires Voltage to compensate TekSavvy for its costs in abiding by the Order, and TekSavvy has provided a reasonable—even conservative—and fully-supported bill of the costs it incurred. TekSavvy's evidence regarding those costs was virtually unchallenged by Voltage, and Voltage's evidence to the contrary is either inappropriate or inapplicable and, in any event, cannot displace the direct evidence of TekSavvy's representatives.

89. The costs incurred by TekSavvy were entirely reasonable and are in line with the costs of litigation. The costs that TekSavvy seeks amount to approximately \$164 per IP address,<sup>107</sup> a modest amount compared to the overall costs of litigation, which Voltage has represented to the Court it fully intends to pursue.<sup>108</sup>

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

90. TekSavvy seeks its costs in the total amount of \$346,480.68, as particularized in its Bill of Costs, together with its costs of this hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

  
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NICHOLAS MCHAFFIE

ALEX SARABURA  
Of Counsel for TekSavvy Solutions Inc.

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<sup>107</sup> TekSavvy's costs (\$346,480.68) / the number of subscribers identified (2,114).

<sup>108</sup> Reasons, TekSavvy Record, Tab 14, at para. 19. Indeed, if Voltage did not have a *bona fide* intention, it would not have been able to obtain the Rule 238 Order.

- 31 -

**Appendix A – Timeline of Major Procedural Steps  
(Affidavit of Marc Gaudrault, at paragraph 11)**

<b>Date</b>	<b>Event</b>
November 1, 2012	TekSavvy first receives draft motion materials from Voltage. They propose return date of November 17, 2012.
November 14, 2012	Voltage agrees to adjourn to December 10, 2012 (later further agrees to adjourn to December 17, 2012).
November 14- December 4, 2012	TekSavvy undertakes IP address correlation.
November 28, 2012	Voltage provides shortened list of IP addresses.
December 10, 2012	TekSavvy provides notice to affected subscribers.
December 11, 2012	Voltage serves motion record.
December 17, 2012	First attendance. Adjourned by Mr. Justice O’Keefe to a date in January 14, 2013.
December 21, 2013	CIPPIC files motion for leave to intervene.
January 14, 2013	Second attendance. Adjourned by Mr. Justice Mandamin to permit determination of motion for leave to intervene by CIPPIC.
February 13, 2013	CIPPIC granted leave to intervene by Madam Prothonotary Tabib.
February-June, 2013	Affidavits, cross-examinations and records.
June 25, 2013	Hearing before Prothonotary Aalto.
February 20, 2014	Decision of Prothonotary Aalto.