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

**FEDERAL COURT**

B E T W E E N:

**VOLTAGE PICTURES LLC**

Plaintiff

**and**

**JOHN DOE and JANE DOE**

Defendants

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# MEMORANDUM OF FACT AND LAW

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Date: November 7, 2014

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## PART I - OVERVIEW

1. On February 20, 2014, Prothonotary Aalto ordered TekSavvy Solutions Inc. ("**TekSavvy**") to disclose to Voltage Pictures LLC ("**Voltage**") the names and addresses associated with 2,114 Internet Protocol ("**IP**") addresses (the "**Order**").

2. Internet Service Providers ("**ISPs**") like Teksavvy have their customers' contact information readily available to them. It takes minutes to correlate an IP address to its associated customer information and, for large requests, simple programs can be written in minutes to correlate thousands of IP addresses at the press of a button. The cost of correlating IP addresses is so low that most ISPs don't even charge for the service. In fact, as of January 2015, ISPs will be forced to correlate IP addresses completely free of charge to comply with the new Notice and Notice provisions of the *Copyright Act*. This requirement emphasizes that (a) for ISP's, correlating IP addresses is part of doing business, and (b) the associated cost is negligible.

3. Steven Rogers, an expert in databases and electronic evidence, opined that it should reasonably have taken a total of 14 hours to correlate the subject IP addresses, at a cost of $884.00, inclusive of legal fees. Any significant deviation from this number is unreasonable, contrary to the fundamental legal principle of fairness, and would have a severe chilling effect on all future, similar litigation.

4. In stark contrast, Teksavvy's brazen and scandalous submission to this Honourable Court claims costs in the outrageous amount of $346,460.68. Shockingly, these costs include (a) legal fees for the underlying Rule 238 motion (even though Teksavvy took no position), (b) costs for Teksavvy's shameless marketing and self-promotion campaign (which it insisted on engaging in notwithstanding Voltage's opposition and through which it greatly increased its customer base),

and (c) other unrelated and exorbitant costs (including airfare and hotel charges), none of which were incurred in abiding by the Order. Further, most of Teksavvy's alleged costs are unsupported by properly admissible evidence, as required by the Rules and extant case law, and cannot therefore be granted.

## PART II – STATEMENT OF FACTS

### (i) Teksavvy Took No Position on Voltage's Rule 238 Motion

5. In 2012, Voltage identified 2,114 IP addresses that engaged in the illegal copying and distribution of its copyrighted works through the BitTorrent network.[1] All of these addresses were assigned by Teksavvy.

> **Affidavit of John Philpott, Sworn July 30, 2014 at Tab 2 of Voltage's Record (the "Philpott Affidavit") at para. 3**

6. From the onset, Teksavvy refused to produce the associated customer information without a court order, but took the position that it would NOT oppose Voltage's Rule 238 motion (the "**Motion**"). This position never changed.

> **Philpott Affidavit, Tab 2 of Voltage's Record, at paras. 5-8**

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[1] The widespread acceptance of internet piracy, through the BitTorrent Network and other means, greatly affects the ability of rights holder to profit from their products, and harms the film industry generally. For example, in its 2013 Special Report, the International Intellectual Property Alliance reported that:

> ...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.

Affidavit of Barry Logan, sworn Jul. 30, 2014, at Tab 1 of Voltage's Record ("**Logan Affidavit**") at paras. 2, 4, 8

7. After advising Voltage that it would NOT oppose the Motion, Teksavvy retained Nicholas McHaffie ("**McHaffie**"). McHaffie too took no position on the Motion.[2] On June 25, 2013, the Rule 238 Motion was heard. The moving party was Voltage. The opposing party was the intervenor, CIPPIC. Given that TekSavvy took no position on the motion and had not filed any materials, it was not in a position to make any formal submissions at the hearing, and did not make any material submissions. Notwithstanding this, Teksavvy seeks costs in the amount of $177,820.98 in legal fees and disbursements for the Motion. This shameless, bloated claim (a) ignores Prothonotary Aalto's Order (which never awarded costs of the Motion), (b) ignores the principles underlying the costs regime in Canada; and (c) reflects Teksavvy's scorn towards rightsholders like Voltage, from whose suffering Teksavvy profits.[3]

**Philpott Affidavit, Tab 2 of Voltage's Record, at paras. 7, 8, 38, 39, 41; Bill of Reasonable Costs Legal Costs of the Responding Party, Tab 1, Vol. I of TekSavvy's Record, p. 5; Order and Reasons for Order of Prothonotary Aalto, Dated February 20, 2014, Tab 14, Vol. II of TekSavvy's Record**

### (ii) Teksavvy Creates a Media Circus

8. While Teksavvy from the outset took no position on the Motion, it nonetheless quickly sought to leverage the event for its own unabashed self-promotion. As early as November 14, 2012[4], TekSavvy insisted on providing notice of the Motion to its affected customers. Voltage

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[2] TekSavvy filed no materials and conducted no cross-examinations for the motion.

[3] TekSavvy targets illegal downloaders by: (a) offering free uploading; (b) offering free downloading between 2 am and 8 am; (c) counteracting throttling; (d) blogging about Torrents on forum discussions; and (e) deleting records after 30 days. See Logan Affidavit, Tab 1 of Voltage's Record, at para. 13, 15, 17-22; and Transcription of Cross-Examination of Marc Gaudrault, dated October 8, 2014, Tab 5, Vol. 1 of Teksavvy's Record p. 66 q. 240.

[4] Voltage's draft motion materials were delivered to Teksavvy on November 1, 2012.

warned Teksavvy that notice was not required[5] and that, if Teksavvy pursued this path, it was entirely on TekSavvy's own volition and without prejudice to Voltage[6].

**Philpott Affidavit, Tab 2 of Voltage's Record, at paras. 11-14**

9. Notwithstanding Voltage's warnings, TekSavvy voluntarily correlated all of the affected IP addresses (before Prothonotary Aalto issued the Order)[7] and commenced a series of ongoing communications with its affected customers. After receiving a positive response for being so "transparent"[8], TekSavvy proceeded to notify all 200,000 of its customers of the Motion.[9] TekSavvy was overwhelmed by its customers' response. Besides notifying all of its customers, Marc Gaudrault ("**Gaudrault**"), TekSavvy's CEO, also attended every court appearance, including the June 25, 2013 hearing, and used each appearance to speak to the press. As a result of the marketing stunt, TekSavvy was able to increase its customer base from 200,000 to 300,000 customers, an increase of 30%.[10] Shockingly, TekSavvy now seeks to charge Voltage $108,586.68 in "operational and administrative" costs for the voluntary marketing actions it insisted on taking (over Voltage's objections) and from which it has significantly profited. As before, none of these costs were incurred in abiding by Prothonotary Aalto's Order. Instead,

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[5] McHaffie was unable to provide any authorities requiring notice in the context of a Norwich order.
[6] In an email dated November 16, 2012, Voltage's counsel expressly insisted that it would not oppose TekSavvy's wish to give its customers notice, provided it did not prejudice Voltage. See Philpott Affidavit, Tab 2 of Voltages' Record, at para. 14; Email dated November 16, 2012 at Tab G of the Philpott Affidavit.
[7] TekSavvy voluntarily undertook this task at its own risk. If Voltage's motion was unsuccessful, Teksavvy would have no mechanism through which to be reimbursed for this expense. Since the work was performed voluntarily, for TekSavvy's own purposes and before a court order was in place, Teksavvy cannot now claim the cost of completing that task following Prothonotary Aalto's order.
[8] For example, see the forum posts by various TekSavvy customers, captured at paragraphs 45 and 46 of the Logan Affidavit, lauding TekSavvy for being "the most transparent and forthright ISP in the land".
[9] In his affidavit, Gaudrault states: "On December 13, 2012, we sent an email notice to all of our customers advising of the existence of the online tool and providing information about the motion by Voltage." Affidavit of Marc Gaudrault, sworn June 27, 2014, Tab 2, Vol. I of TekSavvy's Record, ("**Gaudrault Affidavit**") at para. 30
[10] Between December 2012 and July 2014, TekSavvy's subscribers increased from 200,000 to 300,000. See Gaudrault Affidavit, Tab 2, Vol. I of TekSavvy's Record, at para. 4

these inflated, unrelated charges are a thinly disguised attempt to shield Teksavvy's customers from the litigation by making the process cost prohibitive for Voltage.

**Gaudrault Affidavit, Tab 2, Vol. 1 of TekSavvy's Record, at paras. 4, 17-21, 23, 30; Philpott Affidavit, Tab 2 of Voltage's Record, at para. 40**

### (iii) The IP addresses were correlated in at most 6 days

10. The information retrieval process is quick and inexpensive. TekSavvy knew this when it voluntarily decided to identify all 2,114 addresses for the purposes of providing notice. McHaffie knew this when he advised Voltage that the whole process would take 10-15 business days. TekSavvy confirmed it when the process actually took at most 6 days (including a weekend). Voltage delivered the data file containing the 2,114 IP addresses to Teksavvy on November 28, 2012, and the addresses were correlated by December 4, 2012 (four business days later[11]).

**Philpott Affidavit, Tab 2 of Voltage's Record, at para. 13, 1; Gaudrault Affidavit, Tab 2, Vol. 1 of TekSavvy's Record, at para. 19**

11. Prior to bringing its motion, Voltage retained Barry Logan ("**Logan**"), the principal of Canipre, to inquire how several different ISPs correlate IP addresses in response to court orders. As part of this process, Logan spoke to Patrick Misur ("**Misur**"), TekSavvy's Information Technology Manager. Misur informed Logan that a manual IP address search takes 10 minutes. Misur is also the individual at Teksavvy that ultimately correlated the subject IP addresses.

**Logan Affidavit, Tab 1 of Voltage's Record, at para. 23; Transcription of Cross-Examination of Barry Logan, dated October 9, 2014, Tab 11, Vol. 2 of TekSavvy's Record, p. 132, q. 513**

[11] TekSavvy has not provided any proper evidence to suggest it worked on either weekends or overtime/non-business hours to complete the IP address correlation.

12. Steven Rogers ("**Rogers**"), a former RCMP member that was in charge of its technological forensics department, as well as the founder and principal of Digital Evidence International, Inc. ("**DEI**"), a corporation that provides internet investigation and computer forensic analysis services, was retained to assess the reasonable hours incurred abiding by the Order. Rogers analysed the eight steps identified in Gaudrault's affidavit. Rogers concluded the total reasonable time to complete the IP address search, accounting for all of TekSavvy's steps, is approximately 14 hours.

**Affidavit of Steven Rogers, sworn July 31, 2014, ("Rogers Affidavit"), Tab 3 of Voltage's Record, Tab A, pp. 2, 4, 10-16**

**(iv) Millions of IP Addresses are Correlated Annually**

13. In 2011, there were approximately 1.2 million government requests for customer information made by agencies to ISPs. Between 2012 and 2013, the Canadian Border Services Agency ("**CBSA**") alone submitted 18,849 requests for customer information to TSPs. The CBSA indicates that (a) requests for subscriber information were typically fulfilled in 2-3 business days; and (b) the total cost charged to the CBSA for correlating 18,849 IP addresses was $24,211.00, or just over $1 per request.

**Logan Affidavit, Tab 1 of Voltage's Record, at para. 26, 34; Toronto Star Article at Tab R of Logan Affidavit; CBSA Disclosure at Tab S of Logan Affidavit**

14. On a going forward basis, the Legislature has sought fit, in drafting the *Copyright Modernization Act* S.C. 2012, c. 20, which received Royal Assent on June 29, 2012, to require ISP's to correlate IP addresses at no cost. This direction under the mandatory notice and notice system, which comes into effect on January 1, 2015, reflects policies already incorporated in Europe (discussed below). There, ISP's have been held responsible for the cost of correlating IP

addresses given that they are commercial enterprises that profit by providing services which downloaders use to infringe rights-holders' copyrighted works. As such, the costs of implementing orders is regarded a cost of carrying on that business. By contrast, rights-holders like Voltage are enforcing their legal and proprietary rights as copyright owners and exclusive licensees, which is why the European legislature and courts (and now the Canadian legislature too) have chosen to impose the cost of correlating IP addresses on the ISPs.

**Logan Affidavit, Tab 1 of Voltage's Record, at paras. 27, 28; Notice and Notice Provisions at Tab T of Logan Affidavit**

## PART III – POINTS IN ISSUE

15. The sole issue to be determined on this Motion is the ***reasonable costs*** of correlating 2,114 IP addresses.

## PART IV – SUBMISSIONS

16. Voltage's submissions are divided into three parts:

i. general principles involved in award costs to non-parties;

ii. the reasonable costs for correlating 2,114 IP address; and

iii. other considerations in determining the reasonable costs of abiding by the Order.

### (i) Principles Guiding Costs Awards

#### (a) Non-Parties Have a Civic Duty to Provide Evidence

17. TekSavvy became involved in this litigation by way of *Federal Court Rule* 238(1), "Examination of non-parties with leave", which states:

> A party to an 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.
>
> **SOR/98-106**

18. When a non-party is involved in litigation, either as a witness or to produce documents, "A civic duty is engaged, the performance of which often involves some inconvenience and expense which will not be completely recouped."

> ***Lowe v. Motolanez*, 1996 CarswellOnt 3061 (C.A.) at para. 18 [Tab 1 of Voltage's Brief of Authorities]**

### (b) Costs Awards Must be Fair, Reasonable and Proportional

19. It is trite law that costs awards are guided by principles of fairness, reasonableness and proportionality, and will be applied contextually in every case. Costs are not a function of what a party actually spent, but rather, a reflection of what is a reasonable amount in the circumstances. Reasonableness is the overriding principle. The fundamental objective of keeping costs reasonable is to ensure that they do not obstruct access to justice. Costs awards should not result in a chilling effect on litigation or be so high as to effectively preclude future litigants from bringing similar claims.

> ***Davies v. Clarington (Municipality)*, 2002 CarswellOnt 6185 (C.A.) at para. 52 [Tab 2 of Voltage's Brief of Authorities]; see also *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521 (C.A.) at paras. 37, 38 ("*Boucher*") [Tab 3 of Voltage's Brief of Authorities]**

20. In *Global Enterprises International Inc. v. "Aquarius" (The)*, the plaintiff received a court order allowing for, *inter alia*, the reasonable costs and expenses associated with the storage

of the defendant's boats. Rather than charge the actual cost of storage, the plaintiff claimed costs comparable to what it ordinarily charged a customer. The Court refused their claim, stating:

> However, the issue before me is not whether the plaintiff can claim its tariff rate from the owners of the vessels, but rather whether the amounts claimed are "reasonable costs and expenses" which will allow them to stand in priority as marshall's expenses. In my view, they are not.
>
> It is not disputed that the costs and expenses incurred by the plaintiff in relation to berthage are costs and expenses made for the purpose of maintaining and preserving the vessels during their arrest. However, that does not settle the issue, as those costs and expenses must be "reasonable".
>
> The plaintiff, in my view, is seeking to obtain not only the reimbursement of its "reasonable costs and expenses", but is seeking to obtain reimbursement of its profits. It is clear, and in fact it is not denied by the plaintiff, that the amounts that it is claiming include more than its actual costs and expenses. In my view, the "reasonable" cost of berthage is, on the evidence, the sum of $250 per day per vessel charged by CFI to Global Terminals.
>
> **2002 CarswellNat 340 (F.C.), at paras. 15-17 ("*Global Enterprises*") [Tab 4 of Voltage's Brief of Authorities]**

21. These principles must carry over to determine the reasonable costs associated with abiding by Prothonatory Aalto's Order.

### (ii) The Reasonable Costs of Correllating 2,114 IP addresses

#### (a) Correlating IP addresses is a Simple Process

22. As explained by Rogers, correlating an IP address is a simple process that can be executed in approximately 14 hours from start to finish. The 14 hours includes retrieving and loading the RADIUS log files into a SQL server that runs an automated search, but also the creation and implementation of the necessary infrastructure to run the search. All of this can be completed by one junior systems administrator.

**Rogers Affidavit, Tab 3 of Voltages Record, Tab B, pp. 9-16**

### (b) The Requested Costs Were Not Incurred in Abiding by the Order

23. The plain language of the Order states:

> All ***reasonable*** legal costs, administrative costs and disbursements incurred by TekSavvy ***in abiding by this Order*** shall be paid by the Plaintiff to TekSavvy.

**Order of Prothonotary Aalto, dated February 20, 2014, Tab 14, Vol. II of TekSavvy's Record, at p. 56**

Or, in other words:

> TekSavvy will be reimbursed for its ***reasonable costs in providing the information***.

**Order of Prothonotary Aalto, dated February 20, 2014, Tab 14, Vol. II of TekSavvy's Record at para. 46**

24. Here, Teksavvy incurred over $300,000 in costs (a) on its own volition, and (b) before the Order was issued. These costs related to, *inter alia*, general privacy advice, review of *Copyright Act* amendments, review of CIPPIC's intervention materials, adjournment requests for the purposes of notifying customers, and various costs associated with the voluntary notice it sent to its customers[12]. These costs had nothing to do with abiding by the Order. TekSavvy's only obligation in abiding by Prothonotary Aalto's Order is to: "...disclose to the Plaintiff the contact

[12] TekSavvy claims it put 1,956 hours into "Operations" work, as well as work associated with sending notice to customers affected and public relations. They further claim that these hours amount to a total of $87,236.68 in costs to TekSavvy. These costs pre-date and have nothing to do with the Order. In *Fontaine v. Canada (Attorney General)*, 2012 CarswellOnt 7604 (S.C.J.) at paras. 8-10 [Tab 5 of Voltage's Brief of Authorities], the court was very critical of the type of costs Teksavvy is trying to claim in this action, stating, at para. 9: "I also agree with Canada's submissions to the effect that some items included in the Moving Parties' dockets, such as conducting radio interviews and copying binders should not form part of a claim for 'reasonable legal costs'".

information ... of the TekSavvy customer accounts". It can only seek to recover its reasonable costs for performing that task.

**Order of Prothonotary Aalto, dated February 20, 2014, Tab 14, Vol. II of TekSavvy's Record, at p. 56; Bill of Reasonable Costs of TekSavvy, Tab 1, Vol. 1 of Teksavvy's Record, pp. 3-5**

### (c) Teksavvy Voluntarily Correlated the IP Addresses Prior to the Order

25. Teksavvy voluntarily correlated the IP addresses prior to the issuance of the Order. It agreed that any actions it took at that time would be without prejudice to Voltage.

**Philpott Affidavit, Tab 2 of Voltage's Record, at para. 14; Email dated November 16, 2012, Tab G of the Philpott Affidavit**

26. Given that Teksavvy had already correlated the IP addresses for its own purposes (i.e. to provide its customers with notice), and did so without prejudice to Voltage (knowing that the cost of that correlation could not be claimed from Voltage), there was no cost associated with sharing those same correlated addresses with Voltage after Prothonotary Aalto issued his Order.

### (d) TekSavvy's Legal Fees are Shamelessly Inflated

27. In its "Bill of Reasonable Costs", TekSavvy claims that for the period between November 2012 and April 2014, it incurred a total of $123,580.98 in external legal fees and $54,240.00 in in-house legal fees. These numbers are grossly inflated and disproportionate in the circumstances.

28. In *B & D Construction Inc. v. Buset*, the Court made the following comments:

> The concept of proportionality must be kept in mind when considering the issue of costs. This principle was considered in the case of *Buchanan v. Geotel Communications Corp.*, [2002] O.J. No. 3063 (Ont. S.C.J.) where Ferguson J. had

this to say at paragraphs 10 and 11 of that judgment:

> Having said all that, the bottom line is that the proposed costs are excessive. They are excessive from two perspectives: costs of this magnitude will make litigation inaccessible as a method of dispute resolution; costs of this magnitude are also disproportionate to the value of the legal work necessary to represent a client in this dispute. If counsel do not use more restraint in deciding how much to invest in litigation, they will put both the bar and the Courts out of business which will profoundly harm the public whom we both serve.

Mr. Justice Killeen in *Pagnotta v. Brown*, [2002] O.J. No. 3033 (Ont. S.C.J.) commented on escalating costs and proportionality:

> From my perspective, if lawyers wish to expend such grossly inordinate amounts of billable hours on relatively routine cases, they may feel free to do so subject to their client's approval, but they cannot expect judges to encourage such inefficient expenditures of time when their costs are to be fixed following trial. Judges and assessment officers have a duty to fix or assess costs at reasonable amounts and in this process they have a duty to make sure that the hours spent can be reasonably justified. The losing party is not to be treated as a money tree to be plucked willy nilly by the winner of the contest.

**2005 CarswellOnt 2277 (S.C.J.) at paras. 26 - 28 ("*B & D Construction*") [Tab 6 of Voltage's Brief of Authorities]**

29. Similarly here, the bizarre decision of TekSavvy's counsel to become so heavily involved in a motion that it took ***no position on*** cannot fall adversely on Voltage. In a British Columbia case, the Court was required to determine the costs a non-party could claim for production of documents. A large portion of the costs claimed by the non-party, Vancity, was with respect to solicitor charges for drafting a confidentiality agreement. When the plaintiffs initially wrote to Vancity requesting production of documents, Vancity responded with the following letter from counsel:

> Before responding to your request for documents, we want to ensure that proper

> arrangements are put in place to protect the confidentiality of certain information contained in some of the documents you have requested and to ensure that VanCity is reimbursed for the legal fees and disbursements associated with your request.
>
> Dealing first with the matter of legal fees and disbursements, VanCity is not obliged to produce any documents, particularly documents which contain privileged or confidential information. VanCity should not have to pay to have us review its files to advise it on which documents are privileged or confidential. If you are prepared to reimburse VanCity for its actual legal fees and disbursements, and $100 per hour for VanCity's administrative costs, then VanCity will produce its documents, subject to the confidentiality terms set out below.
>
> ***A.L. Sott Financial (Newton) Ltd. v. Bauman*, 1998 CarswellBC 859 ("*A.L. Sott*") at para. 14 [Tab 7 of Voltage's Brief of Authorities]**

30. The Court refused to award costs extending from the advice and work undertaken by Vancity's counsel in respect to the confidentiality document. The Court made the following general comments on involving counsel when a non-party is asked to produce documents:

> As this is, to my knowledge, the first application concerning third parties' fees under Rule 26(11) to come before the court, it may be useful if I make some further comments on the practice to be followed in these cases. Any sort of legal advice for the third party will, I think, rarely be appropriate. In the normal course of events, no issues of privilege or confidentiality are likely to arise, and discussions about an appropriate fee for the search and photocopying can be handled by the third parties themselves. ***In the usual case, if an ultra-cautious third party consults solicitors, perhaps under a general retainer of corporate counsel, and counsel charge two-tenths of an hour for a stock response, it would not be appropriate that the fee be passed on to the litigant requesting the documents***, on the principle that it would probably cost both parties more to consider and resolve the issue than had been charged in the first place.
>
> But where a request for documentation is particularly extensive or sensitive, the third party may properly claim for appropriate legal advice. In my view, as soon as solicitors are consulted, and before doing any substantive work at all, they should advise the party requesting production that they have received instructions because of specified concerns of the client, and asking or making proposals as to how those concerns will be dealt with. At this stage, the parties requesting the documents can consider whether they wish to proceed, or to restrict the extent of the documents requested, or to abandon the chase altogether. Whatever they

> decide, they should advise the third parties' solicitors in some detail of their position - "We agree to pay a reasonable amount, to be taxed if necessary, for advice on confidentiality"; "None of these documents can possibly be confidential, and we will pay for [retrieval and] copying but apply under Rule 26(11) if you do not agree"; "We will restrict our request to such and such type of documents for the time being"; "Why will retrieval be so time-consuming?". Given that definition of the issues, the parties can then proceed as they are advised and, if necessary, the court will resolve the issue for them, at the usual cost.
>
> ***A.L. Sott, ibid*, at paras. 19-20 [Tab 7 of Voltage's Brief of Authorities]**

31. Here, Prothonotary Aalto's Order couldn't be simpler: "...disclose to the Plaintiff the contact information ... of the TekSavvy customer accounts". No legal issues are triggered by the Order. If Teksavvy is ultra-cautious in consulting lawyers, those fees cannot be passed on to Voltage.

32. Similarly, TekSavvy cannot claim costs for David Elder's ("**Elder**") fees. Elder advised on 'telecom/privacy' matters which had nothing to do with the costs of compliance with the Order. Further, his claimed costs include "reviewing draft and revised press releases".[13] These cannot be considered 'reasonable legal costs'.[14]

33. TekSavvy's bill of costs identifies that on February 20, 2014 McHaffie reviewed Prothonatory Aalto's decision, as well as e-mailed Gaudrault and Tacit to provide advice for the Order, in the span of one hour. As of 2014, McHaffie's hourly rate is $675. Accordingly, the legal work required in abiding by the Order can be determined to cost $675.[15]

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[13] See, for example, Elder's February 28, 2014 Pre-bill.

[14] See *Fontaine v. Canada (Attorney General)*, 2012 CarswellOnt 7604 (S.C.J.), *Ibid*, at para. 9.

[15] Under Rule 239(3) of the *Federal Court Rules*, this expense can only be recovered by Teksavvy if it can show the existence of "special circumstances", which it has failed to do here. Rule 239(3) provides: "On motion, the Court may, in special circumstances, order that the costs of a solicitor assisting a person to be examined under rule 238 be included in the amounts paid under subsection (1)".

**Bill of Reasonable Costs of TekSavvy, Tab 1, Vol. 1 of Teksavvy's Record, P. 1**

### (e) TekSavvy's Evidence of its Costs to Correlate the Addresses is Inadmissable

34. TekSavvy provided the following affidavits to explain its cost of correlating the IP addresses:

i. Chris Gaudrault, the Chief Executive Officer of TekSavvy;
ii. Pascal Tellier, the Chief Information Officer of TekSavvy; and
iii. Pierre Aube, the Chief Operating Office of TekSavvy.

***None*** of these three individuals actually correlated the 2,114 IP addresses.

**Transcription of cross-examination of Tellier, dated October 8, 2014, Tab 6, Vol. 2 of TekSavvy's Record, pp. 5-6, qs. 15-17; Transcription of cross-examination of Aube, dated October 8, 2014, Tab 7, Vol. 2 of TekSavvy's Record, p. 8, q. 27**

35. The affiants provide appendices to their affidavits outlining the hours spent on various areas of work. The affiants did not even create their appendices, making the appendices inadmissible hearsay. In addition, Teksavvy admitted that the times in the appendices were just estimates. No time sheets or time logs were kept of the actual work done.

**Transcription of cross-examination of Gaudrault, dated October 8, 2014, Tab 5, Vol. 1 of Teksavvy's Record, pp. 31-33; Transcription of cross-examination of Tellier, dated October 8, 2014, Tab 6, Vol. 1, pp. 3-4; Transcription of cross-examination of Aube, dated October 8, 2014, Tab 7, Vol. 2 of TekSavvy's Record, p. 4, qs. 9-11**

36. The four TekSavvy employees that supposedly correlated the IP addresses were:

i. Patrick Misur;
ii. Rick Glassford;
iii. Chris Sologuk; and

iv. Pascal Gagnon.

None of these employees produced an affidavit for the herein motion.

**Tellier Affidavit, Tab 3, Vol. 1 of TekSavvy's Record, at para. 4**

37. Misur is the Teksavvy employee that spoke to Logan before Teksavvy received notice that Voltage would be bringing a motion. At that time, Misur had told Logan that it takes 10 minutes to manually correlate an IP address. TekSavvy failed to bring Misur forward for the purposes of this motion, even though he has direct personal knowledge of material facts.

38. Rule 81(2) of the *Federal Court Rules* states:

> Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

**SOR/98-106**

39. As stated in *Stephens v. Canada (Minister of Citizenship and Immigration)*:

> To the extent that an affidavit purports to provide hearsay evidence, little or no weight ought to be afforded to it. I also note that Rule 81(2) of the Federal Courts Rules permits the Court to draw an adverse inference from a party's failure to provide evidence from persons having knowledge of facts otherwise presented on belief. For those reasons, I agree that paras 19, 20, 21, 23, 25-29, 35 and 40-44 of the Applicant's affidavit must either be struck or given very little weight, to the extent that they merely replicate what is already found in the documentary evidence or amount to hearsay.

**2013 CarswellNat 2436 (F.C) at para. 30 [Tab 8 of Voltage's Brief of Authorities]; See also *Geoffrey v. Canada (Minister of Citizenship and Immigration)*, 2014 CarswellNat 623 at paras. 39-41 [Tab 8 of Voltage's Brief of Authorities]**

40. Here, Teksavvy has purported to provide hearsay evidence on the most critical issue before this court, namely, the time involved to correlate the IP addresses. As a result, the following paragraphs of Teksavvy's affidavits must either be struck or be given very little weight[16]:

i. Marc Gaudrault: Paras. 9-25, 53-59 and Appendix "A";
ii. Pascal Tellier: Para. 1 and Appendix "A"; and
iii. Pierre Aube: Para. 4. and Appendix "A".

41. In addition, an adverse inference must be drawn from TekSavvy's failure to provide evidence from Misur, Glassford, Sologuk and Gagnon, persons having direct personal knowledge. TekSavvy has provided no explanation for failing to provide their affidavits.

42. In *Shelanu Inc. v. Print Three Franchising Corp.*, a non-party sought costs for the productions of twenty-four documents for litigation. Aside from the cost of the actual documents, the non-party sought costs for the 39 hours they expended gathering the documents. Ultimately, the non-party was unable to provide proper evidence explaining 39 alleged hours of work. The Court refused to compensate the non-party for the 39 hours, stating the following:

> ... The documents that were produced by Loyalty under the latter category of documents comprise about twenty-four single pieces of paper. They appear to have been generated from a computer. I do not have any satisfactory explanation for why the production of these few pieces of paper would have consumed a total of 39 hours of the time of employees of Loyalty. The amount of time that should have been necessary to produce these documents would be so negligible that I would not generally consider awarding compensation for it...

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[16] See, for example, the following excerpt from *N.M. Paterson & Sons Ltd. v. St. Lawrence Seaway Management Corp.*:

> I do not intend to strike the affidavit submitted by the defendant. Rule 81(1) allows under a motion the production of an affidavit on information and belief. The caveat to that situation is provided by rule 81(2); it could affect the weight to be given to such an affidavit.
>
> 2004 CarswellNat 1250 (F.C.) at para. 10 [Tab 10 of Voltage's Brief of Authorities]

**2001 CarswellOnt 1581 (S.C.J.), at paras. 14 [Tab 11 of Voltage's Brief of Authorities]**

43. Similarly, here, Rogers has provided an expert report that concludes that correlating the 2,114 IP addresses should take no more than 14 hours. This includes logistical planning and the creation of new software and servers that is ***not*** part of the actual technical search and correlation. TekSavvy had the opportunity to properly explain the time and work spent on an IP address search by putting forward evidence of its employees that actually conducted a search. Instead, however, they preferred to put in evidence of estimates and hearsay, and no real explanation of the IP address search process. As a result, TekSavvy has not submitted any proper, formal evidence to support its claims regarding the time it would take to abide by the Order. A reasonable estimate must be determined through Rogers and Logan's evidence.

44. While Rogers included all the time it would take to correlate 2,114 IP addresses, British Courts have held that any logistical planning, software creation and/or server creation required for an IP address search do not form part of the actual search and those costs should be absorbed by the ISPs as a cost of carrying on business. As stated in *20C Fox v. BT (No 2)*:

> Each side contends that the other should pay the costs of implementing the order. In my judgment the costs of implementing the order should be borne by BT. ***The Studios are enforcing their legal and proprietary rights as copyright owners and exclusive licensees, and more specifically their right to relief under Article 8(3). BT is a commercial enterprise which makes a profit from the provision of the services which the operators and users of Newzbin2 use to infringe the Studios' copyright. As such, the costs of implementing the order can be regarded as a cost of carrying on that business. It seems to me to be implicit in recital (59) of the Information Society Directive that the European legislature has chosen to impose that cost on the intermediary.*** Furthermore, that interpretation appears to be supported by the Court of Justice's statement in *L'Oréal v eBay* at [139] that such measures "must not be excessively costly". The cost of implementing the order is a factor that can be taken into account when assessing the proportionality of the injunction, and in the present case I have done so: see the main judgment at [200]. Indeed, my conclusion there that the cost to BT "would be modest and proportionate" is supported by the evidence subsequently filed by BT, which

> estimates the initial cost of implementation at about £5,000 and £100 for each subsequent notification.
> ***[Emphasis Added]***

**[2011] EWHC 2174 (Ch) at para. 32 [Tab 12 of Voltage's Brief of Authorities]**

45. Accordingly, the time spent by TekSavvy planning and implementing, which Rogers assessed should take about 3 hours, should not be paid by Voltage. The remaining time that Voltage should pay for is 11 hours of work.

46. The low-level technicians tasked with correlating IP addresses at most Canadian ISPs receive annual salaries between $35,000 to $45,000. Assuming a similar technician at TekSavvy receives an annual salary of $40,000, this would amount to an hourly rate of $19 per hour.[17] Given the 11 hours of time it should reasonably take TekSavvy to correlate the IP addresses, it would cost them $209 total to complete the search.

**Logan Affidavit, Tab 1 of Voltage's Record, para. 38**

47. With the notice and notice provisions in the *Copyright Act* coming into effect shortly, TekSavvy will be required by law to perform similar searches at no costs to rightsholders. Ultimately the infrastructure that was put in place as a result of the Order will serve to benefit TekSavvy indefinitely.

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[17] Teksavvy's materials claim an inflated $49/hr, which is the amount used by Teksavvy in estimating its costs (see Tellier Affidavit at para. 5). This amount is contradicted by Tellier's own later evidence under cross-examination that the four employees involved in the search make just over $50,000 per annum, which translates into an hourly rate of about $25.

### (f) Teksavvy's Disbursements were Not Incurred In Abiding by the Order

48. TekSavvy makes the baffling claim that it should be paid $55,457.60 for "systems upgrades and hardening re customer support centre to respond to greatly increased inquiry volume and denial of service attacks." It does not explain how this is in any way connected to abiding by Prothonotary Aalto's Order. Further, as explained above, it was TekSavvy's decision to voluntarily notify its 200,000 customers that brought about the increase in volume.

49. As identified in *Global Enterprises* above, TekSavvy is not intended to profit from the costs involved in complying with the Order, but is simply meant to recoup some of its costs that will be expended directly as a result of compliance. Accordingly, Voltage cannot be expected to pay for TekSavvy's system upgrades and customer support initiatives.

50. Similarly, TekSavvy cannot claim disbursements ordinarily awarded to a successful litigant on a motion. As seen in other cases, disbursement costs relating to production orders usually only entail the cost of paper of document production.

> **See, for example, *A.L. Sott Financial, supra* [Tab 6 of Voltage's Brief of Authorities];**
> ***Shelanu Inc. supra* [Tab 11 of Voltage's Brief of Authorities]**

51. Teksavvy cannot claim flight and hotel costs for it's out of town lawyer to fly to Toronto. Such costs are unrelated to the Order and are completely unreasonable. TekSavvy is not based out of Ottawa, and the motion and related examinations were held in Toronto, yet TekSavvy decided to retain counsel in Ottawa. It is not reasonable to expect Voltage to pay for travel to and from Ottawa and hotels in Toronto and taxis for TekSavvy's counsel when TekSavvy's counsel did not even take a position in the motion. These costs are completely unreasonable and payment of these disbursements would be completely disproportionate given TekSavvy's non-

involvement in the motion. Even where parties participate in a motion, courts still criticize and disallow these types of excessive claims:

> Nor am I prepared to allow both of those lawyers to claim 11.0 hours each for attendance at the hearing including travel from Toronto when roughly four hours was spent in court.

***Terrace Manor Ltd. v. Sobeys Capital Inc*, 2012 CarswellOnt 12740 (S.C.J.) at para. 19 [Tab 13 of Voltage's Brief of Authorities]**

52. Equally baffling is why TekSavvy ordered transcripts from cross-examinations that it did not participate in, and which it neither needed nor ever had an opportunity to rely on.

### (iii) Additional Contextual Considerations

#### (a) TekSavvy is a Commercial Enterprise that Profits from Piracy

53. Teksavvy is a commercial enterprise that profits by providing a service that its customers use to infringe copyrighted works. Of all the ISP's, Teksavvy in particular creates an environment geared at attracting customers who wish to illegally download copyrighted works. Teksavvy does this by: (a) offering unlimited downloading between 2 am and 8 am, (b) offering free uploading, (c) advertising that it does not "throttle" file sharing traffic; (d) advising customers how to avoid throttling by other ISP's (such as Bell who Teksavvy rents DSL service from); and (e) hosting and participating in forums that discuss downloading from Torrent sites.

**Logan Affidavit at para. 13, 15, 17-22**

54. In addition, in response to this action, Teksavvy intentionally reduced its log file retention policy from 90 days to 30 days, which will now make it impossible, on a going forward basis, for any rights-holder to identify IP addresses assigned to Teksavvy.

**Cross-Examination of Marc Gaudrault, dated October 8, 2014, p. 66 q. 240**

55. This last act underscores Teksavvy's pro-piracy stance, from which it directly benefits and profits, as well as its contempt for the Courts and their orders, which it has effectively nullified on a going forward basis through its actions.

56. By also seeking to recover ridiculously high and clearly unsupportable costs (which would make anti-piracy litigation cost-prohibitive in Canada), Teksavvy is similarly thumbing its nose at rights-holders and improperly shielding its customers from litigation. This strategy accords with Teksavvy's public statements on its website following the commencement of Voltages's claim that: "Teksavvy will do everything in its power to protect its customers". Teksavvy's costs submissions must be read in that context.

**Logan Affidavit at para. 39, 41, and Exhibits "V", "X" thereto.**

### (b) TekSavvy's Goal is to Stop Future Litigation

57. Any costs decision in this motion will have far-reaching and potentially determinative effects on the future of copyright enforcement cases in Canada. As Canada strives to shed its international image as an IPR (Intellectual Property Rights) offender[18], any costs award that functions to stifle enforcement will instead confirm the IIPA's ("International Intellectual Property Alliance") report that: "It is hard to avoid the conclusion that Canada remains a magnet for sites whose *reason 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

[18] See Logan Affidavit, paras. 1-8

demonstrate a formidable propensity to patronize illegal online sources of copyright material, thus stunting the availability and growth of legal alternatives."[19]

58. Teksavvy wishes to stop any future litigation of this kind so that it can continue to profit from being the intermediary through which piracy is executed. This intent is reflected in its policies, in its recent change to a 30 day record retention policy, and in its outrageous costs claims that seek only to prevent the underlying litigation from proceeding.

59. By suggesting that a rights-holder must pay hundreds of thousands of dollars to identify defendants, TekSavvy is attempting to put a stop to all future internet piracy litigation as it will never be feasible to pay such exorbitant fees. Simply put, if TekSavvy is awarded anything even remotely in the realm of what they are proposing, the chilling effect will be absolute. By contrast, if such awards are granted by our Courts, Teksavvy and other ISP's will stand to make substantial profits from responding to requests from government agencies and/or rights-holders in order to pursue enforcement proceedings.

60. While Teksavvy's motives are self-serving and selfish, the "relief" they are seeking is at the direct expense of, and will ultimately be born, by the film and music industry which it is injuring, including each and every individual involved in those industries, and by the Canadian taxpayer. In its 2013 Special Report, the IIPA stated that "... more than C$1.8 billion and 12,600 full time equivalent jobs were lost across the entire Canadian economy in 200-10 as a result of movie piracy." It also estimated tax losses to the government to be at C$294 million and a loss of GDP of C$965 million across the Canadian economy.

**Logan Affidavit at para. 13, 15, 17-22**

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[19] See Logan Affidavit, para. 5.

### (c) The Costs Award in this Action Will Have Far Reaching Effects

61. In addition to the above, because most requests for subscriber information are currently made by government agencies, a decision in line with Teksavvy's demand will either preclude government agencies from fighting crime, or impose a massive obligation on taxpayers to fund the ISP's "costs". Between 2012 and 2013, the Canadian Border Services Agency, just one of many government agencies, In 2011, there were approximately 1.2 million government requests for customer information made by agencies to TSPs. Between 2012 and 2013, the ("**CBSA**") alone submitted 18,849 requests for customer information to TSPs. If that agency was required to pay $150, as opposed to $1, per search, its ability to function would be severely compromised.

62. If this Honourable Court were to set the price of an IP address search at anywhere near what TekSavvy proposes, ISPs could and would begin to charge government authorities similar rates (based on this Court's new precedent). This would debilitate government agencies or heavily burden the taxpayer. By contrast, ISP's will have been provided with a new profit centre with revenues greater than those likely generated by their primary business.

### (d) TekSavvy's Conduct is Worthy of the Most Stringent Reproach by the Courts

63. The plain language of the Order entitled Teksavvy to seek the ***reasonable*** costs of ***abiding by the Order***. Costs are not, nor were they in this instance, imposed as a punishment on Voltage nor given as a bonus to Teksavvy.[20]

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[20] ***See Kenney v. "Cape York" (The),*** **1989 CarswellNat 109 (F.C.) at para. 20 [Tab 14 of Voltage's Brief of Authorities]**

64. TekSavvy's claims are blatently unsupportable and obviously tainted by improper motives. Further, they fly in the face of and offend long established and fundamental costs principles that TekSavvy's experienced counsel must be familiar with.

65. Where a party's conduct deviates so significantly from the norm, Judges have discretion to deny costs altogether:

> Judges have no mandate or time to teach counsel honesty, ethics, and fairplay, but judges do have a sanction at their disposal in the form of a discretion as to costs under s. 141(1) of the Courts of Justice Act, 1984.
>
> It is true that sometimes Judges turn a blind eye when this sort of conduct comes to light. However, in my view, I cannot ignore the deviation from the norm in this case because it is of such flagrant proportions. To ignore what happened in this case would be to invite its repetition in other cases; that cannot be done.
>
> Although the plaintiff succeeds, I deny it costs for the reasons above.
>
> ***CHML/CKDS et al. v. Telemedia Communications Inc. et al.*, 1988 CarwellOnt 119 (Sup Ct.) at paras. 87-89 [Tab 15 of Voltage's Brief of Authorities]**

66. Similar to s. 141(1) stated above, Rule 400(1) of the *Federal Court Rules* states:

> The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.
>
> **SOR/98-106**

67. It is respectfully submitted that due to TekSavvy's flagrant disregard of fundamental principles of justice, its attempts to profit off of the herein litigation, and its attempts to quell all similar future litigation, TekSavvy should be denied any costs of complying with the Order. Simply put, TekSavvy's submissions and scandalous claims are deserving of the most stringent rebuke, making the complete denial of a costs award appropriate in the circumstances.

## PART V – ORDER SOUGHT

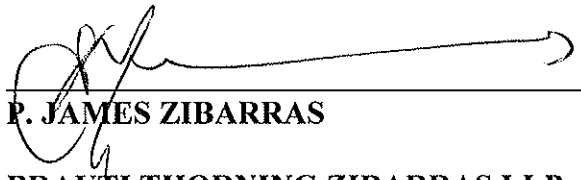
68. For the reasons stated above, it is respectfully submitted that this Honourable Court deny TekSavvy its costs. In the alternative, if it is determined TekSavvy is entitled to costs, it is respectfully submitted that this Honourable Court should order Voltage to provide to TekSavvy no more than $884.00, inclusive of legal fees, for the costs of compliance with Prothonotary Aalto's Order.

## PART VI – LIST OF AUTHORITIES

1. *Lowe v. Motolanez*, 1996 CarswellOnt 3061 (C.A.)
2. *Davies v. Clarington (Municipality)*,2002 CarswellOnt 6185 (C.A)
3. *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521 (C.A.)
4. *Global Enterprises International Inc. v. "Aquarius" (The)*, 2002 CarswellNat 340 (F.C.)
5. *B & D Construction Inc. v. Buset*, 2005CarswellOnt 2277 (S.C.J.)
6. *A.L. Sott Financial (Newton) Ltd. v. Bauman*, 1998 CarswellBC 859
7. *Fontaine v. Canada (Attorney General)*, 2012 CarswellOnt 7604 (S.C.J.)
8. *Stephens v. Canada (Minister of Citizenship and Immigration)*, 2013 CarswellNat 2436 (F.C)
9. *Geoffrey v. Canada (Minister of Citizenship and Immigration)*, 2014 CarswellNat 623
10. *N.M. Paterson & Sons Ltd. v. St. Lawrence Seaway Management Corp.*, 2004CarswellNat 1250 (F.C.)
11. *Shelanu Inc. v. Print Three Franchising Corp.*, 2001 CarswellOnt 1581 (S.C.J.)
12. *20C Fox v. BT (No 2)* [2011] EWHC 2174 (Ch)
13. *Terrace Manor Ltd. v. Sobeys Capital Inc*, 2012 CarswellOnt 12740 (S.C.J.)
14. *Kenney v. "Cape York" (The)*, 1989 CarswellNat 109 (F.C.)
15. *CHML/CKDS et al. v. Telemedia Communications Inc. et al.*, 1988 CarwellOnt 119 (Sup Ct.)

Dated: November 7, 2014

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



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## APPENDIX "A"

## Statutes and Regulations

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## FEDERAL COURT RULES (SOR/98-106)

**Affidavits on belief**

**81. (2)** Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.
Discretionary powers of Court

**Examination of non-parties with leave**

**238. (1)** A party to an 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.

**Costs of solicitor**

**239. (3)** On motion, the Court may, in special circumstances, order that the costs of a solicitor assisting a person to be examined under rule 238 be included in the amounts paid under subsection (1).

**Discretionary powers of Court**

**400. (1)** The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

## REGLES DES COURS FEDERALES (DORS/98-106)

**Poids de l'affidavit**

**81.(2)** Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

**Signification de l'avis de requête**

**238.(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.

**Indemnité additionnelle**

**239. (3)** La Cour peut, sur requête, si des circonstances spéciales le justifient, ordonner qu'un montant équivalent aux frais de l'avocat qui assiste la personne à interroger soit inclus dans les sommes versées conformément au paragraphe (1).

**Pouvoir discrétionnaire de la Cour**

**400. (1)** La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

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

| | | |
|---|---|---|
| **VOLTAGE PICTURES LLC**<br>Plaintiff/Moving Party | **and** | **JOHN DOE AND JANE DOE**<br>Defendants |

**FEDERAL COURT**

Proceeding commenced at Toronto

# MEMORANDUM OF FACT AND LAW


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