

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

ROGERS COMMUNICATIONS INC.

Appellant  
(Respondent)

- and -

VOLTAGE PICTURES, LLC, COBBLER NEVADA, LLC, PTG NEVADA,  
LLC, CLEAR SKIES NEVADA, LLC, GLACIER ENTERTAINMENT S.A.R.L.  
OF LUXEMBOURG, GLACIER FILMS 1, LLC and FATHERS &  
DAUGHTERS NEVADA, LLC

Respondents  
(Appellants)

- and -

SAMUEL-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC  
INTEREST CLINIC (AND OTHERS\*)

Interveners

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**FACTUM OF THE INTERVENERS,  
BELL CANADA INC., CANADIAN NETWORK OPERATORS CONSORTIUM INC.,  
COGECO INC., QUEBECOR MEDIA INC., SASKATCHEWAN  
TELECOMMUNICATIONS HOLDING CORPORATION, SHAW COMMUNICATIONS  
INC., TEKSAVVY SOLUTIONS INC., TELUS COMMUNICATIONS INC. and  
XPLORNET COMMUNICATIONS INC. (“ISP Coalition”)**

Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*

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## TABLE OF CONTENTS

PART I - OVERVIEW.....	1
A. The Statutory Regime .....	2
B. The Norwich Order Regime.....	2
C. Legislative history .....	3
PART II - STATEMENT OF POSITION.....	5
PART III - STATEMENT OF ARGUMENT .....	5
A. The Statutory Regime and the Norwich Order Regime are distinct.....	5
i. Parliament intended two separate schemes .....	5
ii. The separate Statutory Regime is exhausted before obligations on ISPs arise pursuant to Norwich orders.....	6
iii. Policy rationale behind the two regimes favours treating them separately .....	7
B. The FCA Decision conflates the concepts of “fees” and “cost recovery” .....	9
C. Inconsistent treatment of ISPs depending on events occurring before a claim .....	9
PART IV - SUBMISSION ON COSTS.....	10
PART V - ORDER SOUGHT .....	10
PART VI - TABLE OF AUTHORITIES.....	12
PART VII - STATUTES RELIED UPON.....	15

## **PART I - OVERVIEW**

1. This appeal concerns the relationship between two separate legal regimes: the statutory “notice-and-notice” regime in sections 41.25 and 41.26 (the “**Statutory Regime**”) of the *Copyright Act* (“*Act*”) allowing rights holders to send internet service providers (“**ISPs**”) notice of claimed infringement without resort to litigation, and the common law regime for court-ordered disclosure by third parties which predates it (the “**Norwich Order Regime**”).<sup>1</sup> The two regimes have been inappropriately conflated in the decision under Appeal.

2. The most sensible outcome, consistent with Parliament’s intent and the policy reasons for enacting the Statutory Regime, is that the *Norwich* Order Regime continue undisturbed so that judges hearing motions or applications for *Norwich* orders maintain the discretion to craft orders with appropriate terms. This discretion includes the ability to order cost recovery for third-party ISPs when they are required to disclose the identity of subscribers during copyright infringement proceedings.<sup>2</sup>

3. Some ISPs may receive hundreds of thousands of infringement notices per month.<sup>3</sup> While the Statutory Regime requires ISPs to retain information capable of identifying alleged infringers, for many ISPs this requirement is simply met by following their usual retention policies. However, disclosure pursuant to a *Norwich* order involves work to compile, determine, manually verify, and disclose the actual identities of defendants (in this case, ISP subscribers).<sup>4</sup> Unlike the Statutory Regime, disclosure orders such as *Norwich* orders are granted by courts in proceedings that consider the specific circumstances before them, including the *bona fides* of the plaintiff’s allegations and the burden imposed on third parties subject to such orders.

4. The ISPs in the ISP Coalition vary widely in size and differ in network technology and infrastructure. Judges hearing applications for *Norwich* orders should continue to be able to

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<sup>1</sup> *Norwich Pharmacal Co. v. Customs & Excise Commissioners*, [1973] UKHL 6, [1974] A.C. 133; *Federal Courts Rules*, SOR/98-106, Rule 233;

<sup>2</sup> See for example, para 3 of the order of the Federal Court in *Voltage Pictures LLC v John Doe*, 2014 FC 161 [Voltage 2014]: “All reasonable legal costs, administrative costs and disbursements incurred by [ISP] in abiding by this Order shall be paid by the Plaintiff to [ISP].”

<sup>3</sup> Factum of the Appellant, *Rogers Communications Inc*, para 36 [Factum of the Appellant].

<sup>4</sup> See *Voltage Pictures LLC v John Doe*, 2015 FC 1364 at para 79; see also, for example, para. 1 of the Order of the Federal Court in this appeal.

consider the circumstances of the third-party ISPs being compelled to provide identifying information when deciding whether and how to order cost recovery.

**A. The Statutory Regime**

5. The Statutory Regime applies generally to all ISPs, regardless of their specific circumstances, and provides copyright owners with certain tools that do not require them to resort to litigation. Rights holders may send notices of claimed infringement to ISPs who are in turn required to forward those notices electronically based on the IP address included with the notice. ISPs are also required to “retain records that will allow the identity of the person to whom the electronic location belongs to be determined”.<sup>5</sup> The regime provides for statutory damages against ISPs for failing to comply with these obligations.<sup>6</sup> Courts are not required to evaluate the validity of rights holder infringement claims under subsections 41.25 and 41.26.

**B. The Norwich Order Regime**

6. Pursuant to the *Norwich* Order Regime a party may “obtain a pre-litigation order against a third party compelling disclosure of identifying information and documents”.<sup>7</sup> *Norwich* orders are sought and obtained in a wide variety of cases. The court hearing the application for a *Norwich* order must find that the underlying claim is *bona fide*, the third party is the only practical source of the information, and the interests of justice favour the disclosure. The latter requires balancing the benefit of the disclosure to the applicant against the prejudice to the subject of the allegation, including the legitimate privacy concerns associated with the information’s disclosure.<sup>8</sup> Plaintiffs seeking a *Norwich* order must also show that the responding third party can be indemnified for the costs of any disclosure.<sup>9</sup>

7. A *Norwich* order is an equitable remedy.<sup>10</sup> The judge hearing the application must use discretion to balance several competing considerations, both between the parties to the litigation, and those of the third party from whom disclosure is sought. The court may decline to make the

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<sup>5</sup> *Copyright Act*, RSC 1985, c C-42, s 41.26(1)(b).

<sup>6</sup> *Ibid* s 41.26(3).

<sup>7</sup> FCA Decision at para. 16.

<sup>8</sup> *Ibid* at para 17-20; *Voltage* 2014, *supra* note 2 at para 35.

<sup>9</sup> *1654776 Ontario Limited v Stewart*, 2013 ONCA 184, 114 OR (3d) 745 [Stewart].

<sup>10</sup> *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, [2017] 1 SCR 824 at paras 23 and 31.

requested *Norwich* order or impose terms on the parties, such as cost recovery for the third-party respondent.

8. Prior to the Federal Court of Appeal's decision ("**FCA Decision**")<sup>11</sup> it was clear that the *Norwich* Order Regime allowed judges to order for the recovery by ISPs of the actual costs of information retrieval, analysis, compilation, and disclosure. It remains that in all other cases a plaintiff seeking a *Norwich* Order must indemnify the third party for their costs and expenses of complying with the disclosure order.

### *C. Legislative history*

9. Enacted in 2012, the *Copyright Modernization Act*<sup>12</sup> ("**CMA**") was the culmination of a long process of comprehensive copyright reform. The Statutory Regime was one component of many introduced by the reform.

10. Notice-and-notice has been a fixture of Canadian copyright reform efforts dating back to 2005 when it was included in Bill C-60.<sup>13</sup> Since its creation as a voluntary regime, notice-and-notice has been seen as a made-in-Canada counterpart<sup>14</sup> to the American "notice-and-takedown" regime<sup>15</sup> implemented by the U.S. *Digital Millennium Copyright Act* ("**DMCA**").<sup>16</sup> While the *CMA* is "relatively new"<sup>17</sup>, notice-and-notice is not.

11. Extra-judicial tools like notice-and-notice and notice-and-takedown have thus been a consistent feature of Canadian digital copyright reform. The 2004 *Interim Report on Copyright Reform* leading to Bill C-60 examined the choice between notice-and-notice and notice-and-takedown.<sup>18</sup> In later efforts, legislators also considered a system of "graduated response" where

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<sup>11</sup> FCA Decision, *supra* note 7.

<sup>12</sup> *Copyright Modernization Act*, SC 2012, c 20.

<sup>13</sup> Bill C-60, *An Act to amend the Copyright Act*, 1st Sess, 38<sup>th</sup> Parl, 2005 [Bill C-60].

<sup>14</sup> See Canada, Law and Government Division, "Legislative Summary: Bill C-60: An Act to amend the Copyright Act", Publication No LS-512E (Ottawa: Library of Parliament, 20 September 2005) [C-60 Legislative Summary].

<sup>15</sup> The European Parliament also chose a "notice-and-takedown" solution, see Directive 2000/31/EC of the European Parliament

<sup>16</sup> *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998); 17 USC § 512.

<sup>17</sup> FCA Decision, *supra* note 7 at para 3.

<sup>18</sup> House of Commons, Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform* (May 2004) (Chair: Sarmite D. Bulte).

consumers could be disconnected from the Internet after receiving a number of notification letters warning that they are violating copyright.<sup>19</sup> In each case rights holders sought tools to change behavior outside of legal proceedings.<sup>20</sup>

12. Bill C-60 rejected notice-and-takedown over concerns of the dangers it posed to civil liberties.<sup>21</sup> When introducing Bill C-11 (eventually enacted as the *CMA*) the Minister of Canadian Heritage noted that the government “disagreed” with the American notice-and-takedown approach.<sup>22</sup>

13. Despite their differences, rights holders may invoke notice-and-notice and notice-and-takedown<sup>23</sup> without having to resort to litigation. Similarly, rights holders are not required to give notices of claimed infringement under the Statutory Regime or the *DMCA* to enforce their rights or to bring claims for copyright infringement.<sup>24</sup> The Statutory Regime is a regime apart from traditional infringement remedies sought through courts.

14. When Parliament was considering the first notice-and-notice provisions in Bill C-60, Industry Canada tabled a report on the costs to ISPs of the voluntary notice-and-notice regime.<sup>25</sup> The report considered ISP costs in processing and forwarding notices of claimed infringement. The relevance of this report is obvious as, like in the Statutory Regime, Bill C-60 would have allowed the Minister of Industry to set a maximum fee for ISPs’ notice and retention obligations.

15. In contrast, neither the 2006 Industry Canada report nor any subsequent report in conjunction with Canadian copyright reform considered ISPs’ cost of complying with disclosure orders during infringement proceedings or suggested that such costs were pertinent in considering whether to establish a notice-and-notice regime. There is nothing to suggest that

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<sup>19</sup> See Canada, Law and Government Division, “Legislative Summary of Bill C-11: An Act to amend the Copyright Act”, Publication No 41-1-C11E (Ottawa: Library of Parliament, 14 October 2011, Revised 20 April 2012).

<sup>20</sup> See the evidence of Wendy Noss, House of Commons, Legislative Committee on BILL C-32, Evidence, 40th Parl, 3rd Sess, No 14 (17 February 2011).

<sup>21</sup> See C-60 Legislative Summary, *supra* note 14.

<sup>22</sup> Book of Authorities of the Respondents [RBOA], Tab 5.

<sup>23</sup> See *Lenz v Universal Music Corp*, 815 F.3d 1145 (9th Cir 2015), referring to notice-and-takedown as “extrajudicial takedown procedures”.

<sup>24</sup> US, Senate Committee on the Judiciary, 105<sup>th</sup> Cong, *The Digital Millennium Copyright Act of 1998*, (S Doc No 105-190)(Washington DC: US Government Printing Office, 1998)

<sup>25</sup> see C-11 Legislative Summary, *supra* note 19.

notice-and-notice or the Statutory Regime were intended to shift the cost of compliance with *Norwich* orders from plaintiffs to ISPs. To the extent evidence was given to Parliament on fees, it was in the context of processing notices and ensuring “government fee schedules so that the appropriate fees are set up”.<sup>26</sup>

## **PART II - STATEMENT OF POSITION**

16. The Interveners submit that the Statutory Regime, which applies outside of litigation to any assertion of alleged infringement by rights holders, was not meant to inhibit the discretion of courts in weighing the specific circumstances that come before them on motions or applications for disclosure under *Norwich* orders. The Interveners take no position on whether the Appellant should be able to recover its costs in this case.

## **PART III - STATEMENT OF ARGUMENT**

### ***A. The Statutory Regime and the Norwich Order Regime are distinct***

#### *i. Parliament intended two separate schemes*

17. As is clear from the legislative history surrounding notice-and-notice, the Statutory Regime is intended as a tool for use outside of litigation, which operates to warn and deter infringers while preserving rights owners' ability to take further action. The Statutory Regime does not address information retrieval, analysis, compilation or disclosure. Yet, the FCA Decision finds that these obligations, which originate in the *Norwich* Order Regime, are now “implied from” the Statutory Regime.<sup>27</sup>

18. The Court held that subsection 41.26(1) requires ISPs to:

identify suspected infringers, to locate the relevant records, to identify the suspected infringers, to verify the identification work it has done (if necessary), to send the notices to the suspected infringers and the copyright owner, to translate the records (if necessary) into a manner and form that allows them both to be disclosed promptly and to be used by copyright owners and later the courts to determine the identity of the suspected infringers, and, finally, to keep the records ready for prompt disclosure.<sup>28</sup>

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<sup>26</sup> See the evidence of Suzanne Morin (Bell), House of Commons, Legislative Committee on BILL C-32, Evidence, 40th Parl, 3rd Sess, No 19 (22 March 2011).

<sup>27</sup> FCA Decision, *supra* note 7 at paras 32 and 47.

<sup>28</sup> *Ibid* at para 40.

19. The Federal Court of Appeal went on to say that any costs related to identification and verification of the subjects of a *Norwich* order are costs related to obligations imposed by section 41.26(1).<sup>29</sup>

20. The Statutory Regime requires ISPs to forward the notices of claimed infringement they receive from rights holders. It also requires them to “retain records that *will allow* the identity of the person to whom the electronic location belongs *to be determined*”. It does not require that the identity of the person actually be determined, verified, or prepared for disclosure at the notice stage.<sup>30</sup>

21. Thus, the retrieval, analysis, compilation and disclosure obligations created by *Norwich* orders predate the Statutory Regime and *Norwich* orders remain the source of those obligations for ISPs who are subject to them. The Statutory Regime does not speak to and is not intended to address those obligations. Instead, it fills a distinct gap for rights holders for tools to discourage infringement outside of litigation.

*ii. The separate Statutory Regime is exhausted before obligations on ISPs arise pursuant to Norwich orders*

22. The well-established tenets of statutory interpretation require that statutes “be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”<sup>31</sup>

23. Once ISPs forward the required notice, confirm they have done so, and so long as they continue to retain records for the prescribed period, the Statutory Regime is exhausted. When a rights holder begins infringement proceedings and is granted a disclosure order under the *Norwich* Order Regime, an entirely new set of obligations is imposed on the ISP by the court’s order.

24. The Federal Court of Appeal has read obligations into the Statutory Regime that go far beyond what can be supported by the relevant provisions of the *Act*. The Statutory Regime does

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<sup>29</sup> *Ibid* at para 60.

<sup>30</sup> Some ISPs have tools that were developed to automatically forward the millions of notices received every month by accessing customers’ email addresses. These tools do not determine current addresses; hence the need for a manual process under the *Norwich* Order Regime. See e.g. *Factum of the Appellant* at para 42.

not require any use, analysis, or translation of retained information or that ISPs take any steps to verify the identity of the person to whom the information relates. Indeed, the obligation to retain records that “*will allow the identity of the person... to be determined*” implies that some analysis of the retained records will be required to identify the subject person and that this will be undertaken in the future, outside of the Statutory Regime.

25. If Parliament had intended ISPs to satisfy the exact same obligations in response to each of the more than one million notices ISPs receive each month<sup>32</sup> as they must in response to *Norwich* orders, it would have spelled out those obligations in the Statutory Regime. For example, Parliament could have expressed that ISPs have an obligation to “identify, and retain records that identify the person” instead of “retain records that *will allow* the identity of the person to whom the electronic location belongs *to be determined*”.

26. Similarly, Parliament would not have intended ISPs to understand that certain unspoken obligations were implicit in the Statutory Regime. It was not open to the Federal Court of Appeal to conclude that all “identification and verification work”<sup>33</sup> necessary to properly disclose subscriber identity under *Norwich* orders is also required by the notice and retention obligations of the Statutory Regime. Neither the words or intent of subsections 41.25 and 41.26 support such a view.

*iii. Policy rationale behind the two regimes favours treating them separately*

27. Parliament’s focus in enacting the Statutory Regime was to create a more accessible means (relative to infringement proceedings) to change online behavior by notifying alleged infringers of their conduct and retaining the required information, all without requiring recourse to courts.<sup>34</sup>

28. It follows that Parliament did not, in enacting the Statutory Regime, allow rights holders to in the words of the Federal Court of Appeal “seek information from internet service providers to lift the cloak of anonymity and reveal the identity of the suspected infringers so the copyright

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<sup>32</sup> Factum of the Appellant, *supra* note 3 at para. 36.

<sup>33</sup> FCA Decision, *supra* note 7 at para 70.

<sup>34</sup> See *supra* note 26. In committee hearings regarding Bill C-32, legislators repeatedly asked ISP and other stakeholder witnesses questions on the effectiveness of the voluntary notice-and-notice regime in changing online behavior.

owners can act to protect their rights”.<sup>35</sup> The *Norwich* Order Regime already served this function.<sup>36</sup>

29. The Federal Court of Appeal found that the “protection and vindication of rights of copyright owners” is “a central feature of the *Copyright Act*”<sup>37</sup> and that “a fee for these costs would be an end run around the legislative decision”.<sup>38</sup> In doing so it interprets the Statutory Regime as putting the same burden on ISPs in addressing rights holder notices as in responding to compelled disclosure under a *Norwich* order. This incredibly onerous interpretation, the Federal Court of Appeal finds, is “no surprise given the purposes the legislative regime serves and the broader purposes of the *Copyright Act*.”<sup>39</sup>

30. The Federal Court of Appeal’s view of the *Act* is at odds with this Court’s expressed view, which has left behind “an earlier, author-centric view which focused on the exclusive right of authors and copyright owners”<sup>40</sup> and repeatedly adopted a construction of the *Act* with neither owners’ nor users’ rights at its centre. ISPs are inextricably linked to the “encouragement and dissemination of works of the arts and intellect”<sup>41</sup> and carry out one of the core objectives of the *Act*. The Federal Court of Appeal’s assumption that Rogers (and by implication other ISPs) may simply “apply their advanced technological expertise” to escape the burdens of the FCA Decision is unsupported and unjustified in law.<sup>42</sup>

31. This Court has held that “Parliament had decided there is a public interest in encouraging intermediaries who make telecommunications possible to expand and improve their operations

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<sup>35</sup> FCA Decision, *supra* note 7 at para 3.

<sup>36</sup> Letter from the Honourable James Moore and the Honourable Shelly Glover, p 2, Appellant’s Record [AR], Tab 8B, p 72.

<sup>37</sup> *Ibid*, at para 23.

<sup>38</sup> *Ibid*, at para 70.

<sup>39</sup> *Ibid*, para 48.

<sup>40</sup> *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 at para 9.

<sup>41</sup> *Théberge v Galerie d’Art du Petit Champlain Inc*, 2002 SCC 34, [2002] 2 SCR 336 at para 30.

<sup>42</sup> FCA Decision, *supra* note 7 at para 52.

without the threat of copyright infringement”.<sup>43</sup> The FCA Decision’s approach is contrary to this Court’s jurisprudence and leads to a finding that is contrary to Parliament’s intent.

32. A reading of the plain meaning of sections 41.25 and 41.26, which accounts for Parliament’s intent to implement the Statutory Regime separate from the *Norwich* Order Regime in order to serve distinct purposes, and which draws on Parliament’s view of the *Act* as balancing several interests and objectives and not just those of rights holders, requires the conclusion that the *Norwich* Order Regime be left undisturbed by the Statutory Regime.

***B. The FCA Decision conflates the concepts of “fees” and “cost recovery”***

33. The FCA Decision conflates the concept of “fees” in the Statutory Regime with the concept of “cost recovery” in the *Norwich* Order Regime. Fees need not be related to the costs of providing a service. Further, fees may be determined and assessed *ex-ante*. That is precisely the sense in which the term is used in subsection 41.26, where the person who receives a notice (i.e. ISPs) shall, “on being paid any fee”, discharge its obligations under the subsection. In the Statutory Regime a fee is a charge that is assessed and paid prior to the obligations under the subsection being undertaken.

34. In contrast, costs in the context of a *Norwich* order are established in the context of an indemnity by the plaintiff of the third party’s actual costs of disclosure.<sup>44</sup> The obligation of the party seeking the order is not to pay an arbitrarily pre-determined fee but rather to allow the third party to recover its actual costs of complying with the order as considered and approved by a court.

***C. Inconsistent treatment of ISPs depending on events occurring before a claim***

35. As a result of the FCA Decision, ISPs who are subject to *Norwich* orders will still be able to recover their costs of compliance in all types of defamation, trademark, and copyright cases—*except* cases that are brought after a notice of claimed infringement was sent under the Statutory Regime.<sup>45</sup> There is no principled reason for this inconsistency in approach.

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<sup>43</sup> *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 at para 112.

<sup>44</sup> *Autopoietic Telemetric Solutions Limited v John Loughlin*, 2012 ONSC 2305 at para 15; Stewart, *supra* note 9 at para 24.

<sup>45</sup> Stewart, *supra* note 9 at paras 25 and 76.

36. For example, a plaintiff seeking to sue an anonymous blogger for defamation would need a *Norwich* order to obtain identifying information about the blogger from his or her ISP. In all such cases, regardless of which area of law applies to the claim, ISPs ordered to disclose identifying information about anonymous alleged wrongdoers are able to have their reasonable costs of retrieval, verification and disclosure considered by the court of first instance.

37. Not only does the FCA Decision create a distinction for ISPs between copyright and other types of claims regarding cost recovery for complying with a *Norwich* order, it would also create a distinction between copyright cases. No copyright owner is obligated to make use of the Statutory Regime. A copyright owner is entitled to begin a claim for copyright infringement and to apply for a *Norwich* order to identify a subscriber even if he or she never sent a notice of claimed infringement under the Statutory Regime.

38. Under the FCA Decision's reasoning, courts would not be able to order meaningful cost recovery if the ISP happened to receive a notice of claimed infringement that ultimately relates to the defendant. Conversely, courts could order meaningful cost recovery if the ISP did not. Given the millions of notices that ISPs receive each month, Parliament could not have intended to enact such an arbitrary system.

39. Finally, the ISP Coalition notes that treating ISPs differently than other non-parties that are subject to discovery motions with respect to cost recovery for complying with *Norwich* orders, based solely on the technological function performed by the ISPs, appears to run counter to this Court's determination that the Act should be interpreted in technologically-neutral way.<sup>46</sup>

#### **PART IV - SUBMISSION ON COSTS**

40. The ISP Coalition does not seek costs and asks that costs not be awarded against it.

#### **PART V - ORDER SOUGHT**

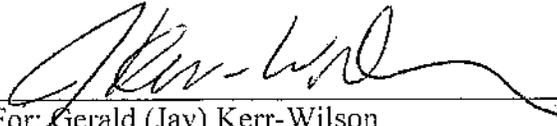
41. The ISP Coalition has already been granted permission to present oral arguments at the hearing of the appeal not to exceed five minutes.

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<sup>46</sup> *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231; *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615.

April 18, 2018

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to read "Gerald (Jay) Kerr-Wilson", written over a horizontal line.

For: Gerald (Jay) Kerr-Wilson  
Ariel Thomas  
Christopher Ferguson

Counsel for the Interveners

**PART VI - TABLE OF AUTHORITIES**

Authority	Referring Paragraph(s)
<b>CASES</b>	
<i>1654776 Ontario Limited v Stewart</i> , <a href="#">2013 ONCA 184</a> , 114 OR (3d) 745 [Stewart]	6,34
<i>Autopoietic Telemetric Solutions Limited v John Loughlin</i> , <a href="#">2012 ONSC 2305</a>	34
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**PART VII - STATUTES RELIED UPON**

*Copyright Act, RSC 1985, c C-42 ss. 41.25, 41.26*

<b>Provisions Respecting Providers of Network Services or Information Location Tools</b>	<b>Dispositions concernant les fournisseurs de services réseau et d'outils de repérage</b>
<p><b>Notice of claimed infringement</b></p> <p><b>41.25 (1)</b> An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides</p> <p>(a) the means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network;</p> <p>(b) for the purpose set out in subsection 31.1(4), the digital memory that is used for the electronic location to which the claim of infringement relates; or</p> <p>(c) an information location tool as defined in subsection 41.27(5).</p> <p><b>Form and content of notice</b></p> <p>(2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall</p> <p>(a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;</p> <p>(b) identify the work or other subject-matter to which the claimed infringement relates;</p>	<p><b>Avis de prétendue violation</b></p> <p><b>41.25 (1)</b> Le titulaire d'un droit d'auteur sur une oeuvre ou tout autre objet du droit d'auteur peut envoyer un avis de prétendue violation à la personne qui fournit, selon le cas :</p> <p>a) dans le cadre de la prestation de services liés à l'exploitation d'Internet ou d'un autre réseau numérique, les moyens de télécommunication par lesquels l'emplacement électronique qui fait l'objet de la prétendue violation est connecté à Internet ou à tout autre réseau numérique;</p> <p>b) en vue du stockage visé au paragraphe 31.1(4), la mémoire numérique qui est utilisée pour l'emplacement électronique en cause;</p> <p>c) un outil de repérage au sens du paragraphe 41.27(5).</p> <p><b>Forme de l'avis</b></p> <p>(2) L'avis de prétendue violation est établi par écrit, en la forme éventuellement prévue par règlement, et, en outre :</p> <p>a) précise les nom et adresse du demandeur et contient tout autre renseignement prévu par règlement qui permet la communication avec lui;</p> <p>b) identifie l'oeuvre ou l'autre objet du droit d'auteur auquel la prétendue violation se rapporte;</p>

(c) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;

(d) specify the location data for the electronic location to which the claimed infringement relates;

(e) specify the infringement that is claimed;

(f) specify the date and time of the commission of the claimed infringement; and

(g) contain any other information that may be prescribed by regulation.

#### **Obligations related to notice**

**41.26 (1)** A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,

(a) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and

(b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.

#### **Fees related to notices**

c) déclare les intérêts ou droits du demandeur à l'égard de l'oeuvre ou de l'autre objet visé;

d) précise les données de localisation de l'emplacement électronique qui fait l'objet de la prétendue violation;

e) précise la prétendue violation;

f) précise la date et l'heure de la commission de la prétendue violation;

g) contient, le cas échéant, tout autre renseignement prévu par règlement.

#### **Obligations**

**41.26 (1)** La personne visée aux alinéas 41.25(1)a) ou b) qui reçoit un avis conforme au paragraphe 41.25(2) a l'obligation d'accomplir les actes ci-après, moyennant paiement des droits qu'elle peut exiger :

a) transmettre dès que possible par voie électronique une copie de l'avis à la personne à qui appartient l'emplacement électronique identifié par les données de localisation qui sont précisées dans l'avis et informer dès que possible le demandeur de cette transmission ou, le cas échéant, des raisons pour lesquelles elle n'a pas pu l'effectuer;

b) conserver, pour une période de six mois à compter de la date de réception de l'avis de prétendue violation, un registre permettant d'identifier la personne à qui appartient l'emplacement électronique et, dans le cas où, avant la fin de cette période, une procédure est engagée par le titulaire du droit d'auteur à l'égard de la prétendue violation et qu'elle en a reçu avis, conserver le registre pour une période d'un an suivant la date de la réception de l'avis de prétendue violation.

#### **Droits**

(2) The Minister may, by regulation, fix the maximum fee that a person may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection.

**Damages related to notices**

(3) A claimant's only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.

**Regulations — change of amounts**

(4) The Governor in Council may, by regulation, increase or decrease the minimum or maximum amount of statutory damages set out in subsection (3).

(2) Le ministre peut, par règlement, fixer le montant maximal des droits qui peuvent être exigés pour les actes prévus au paragraphe (1). À défaut de règlement à cet effet, le montant de ces droits est nul.

**Dommages-intérêts**

(3) Le seul recours dont dispose le demandeur contre la personne qui n'exécute pas les obligations que lui impose le paragraphe (1) est le recouvrement des dommages-intérêts préétablis dont le montant est, selon ce que le tribunal estime équitable en l'occurrence, d'au moins 5 000 \$ et d'au plus 10 000 \$.

**Règlement**

(4) Le gouverneur en conseil peut, par règlement, changer les montants minimal et maximal des dommages-intérêts préétablis visés au paragraphe (3).