

FEDERAL COURT

BETWEEN:

VOLTAGE PICTURES LLC

PLAINTIFF/MOVING PARTY

- and -

JOHN DOE and JANE DOE

DEFENDANTS

- and -

TEKSAVVY SOLUTIONS INC.

RESPONDING PARTY

- and -

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

INTERVENER

MOTION RECORD OF THE SAMUELSON-GLUSHKO CANADIAN INTERNET
POLICY AND PUBLIC INTEREST CLINIC
(Motion for a written examination of a non-party under rule 238)

Volume 2 of 4: Memorandum of Fact and Law

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MEMORANDUM OF FACT AND LAW



PART I – THE NATURE OF THIS APPLICATION

1. This Application requires the Court to balance a plaintiff’s interest in its request for the personal information of thousands of individuals against the interests of those individuals and, indeed, against the wider public interest in the administration of justice. This

balance will be calibrated in the context of the Applicant's request for a *Norwich* Order – itself a litigation tool rapidly evolving in Canada – and against the background of rapidly evolving technology.

Notice of Motion, *Applicant's Motion Record*, Tab 1

PART II – THE FACTS

2. CIPPIC is a body established by the University of Ottawa to research and advocate on important public policy issues involving the intersection of law and technology from a public interest perspective. CIPPIC's mandate includes intervening before courts, tribunals, and other decision-making bodies on such issues in order to bring forward important points or perspectives that might otherwise not be represented. CIPPIC has a particular interest in the legal issues raised in this proceeding insofar as their determination will define the scope of protection courts may afford anonymous online activity. While this case involves unauthorized file-sharing, the test the Court adopts will apply equally to whistle-blowers and confidential sources of documents leaked in the public interest. Copyright may be a tool employed against both classes of defendants.

Voltage's Claim

3. Voltage in this action makes claims against numerous unknown individuals for copyright infringement. This is in line with their previous suits in the United States where they have claimed against at least 28,271 individuals.

Affidavit of Alexander Cooke, Tab 1-A at para. 11.

4. The defendants here are alleged to have shared Voltage's copyrighted material via BitTorrent, and Voltage has presented a list of Internet Protocol addresses (or "IP addresses") which it says are associated with that activity. Both BitTorrent and IP

addresses are discussed below.

5. The IP addresses were collected by a firm called Canipre, as described in the affidavit of Mr. Barry Logan included in Voltage's motion record. The transcript of a cross-examination of Mr. Logan on his affidavit is included here at Tab C.
6. Relying on this list of IP addresses Voltage has filed this motion for non-party disclosure pursuant to Rule 238. The non-party is the Respondent, Teksavvy Solutions Inc.
7. Specifically, Voltage requests the "Infringers' contact information", and in its Statement of Claim writes that it has "[t]hrough a forensic investigation ... identified the Defendants". Yet what it seeks is at most the contact information of account-holders who may or may not have information as to the identity of the infringers, since the Respondent plainly states that "The Defendants are members of peer-to-peer ("P2P") internet networks", and not merely those who pay the bill.

Written Representations, Respondent's Motion Record at paras. 16-17; Respondent's Statement of Claim at paras. 4, 9.

IP Addresses

8. An IP address is a numerical identifier assigned to a device so as to allow it to communicate with other devices via Internet Protocol. Internet Service Providers ("ISPs") assign IP addresses to devices on their networks

Affidavit of Timothy Lethbridge, Tab 1-B at para. 1.

9. Addresses are subject to change. This change can be initiated by the ISP or individuals. Since this may happen at any moment it is critical that an interested third-party observer be able to calibrate its timekeeping device against that of an ISP maintaining a log of such address changes so as to account for the possibility of clock drift.

Affidavit of Timothy Lethbridge, Tab 1-B at paras. 6, 8-9.

10. While a public-facing IP address is unique it is not necessarily tied to any one device or individual. For example, all computers using a coffee shop's free internet may share an IP address. Likewise, all members of a household, like roommates, or guests thereof using household internet, will share an IP address. This is standard procedure.

Affidavit of Timothy Lethbridge, Tab 1-B at paras. 2-4, 11-12.

11. If a subscriber maintains an open, non-password protected WiFi network then any stranger within range could connect. That stranger's behaviour would be attributed to the subscriber's account. Similarly, a guest entrusted with a network password might share it with others, allowing third parties to connect to the network without the subscriber's knowledge.

Affidavit of Timothy Lethbridge, Tab 1-B at paras. 10.

12. Individuals can obscure their IP address to some extent by using anonymizing services and Virtual Private Networks ("VPNs"). Their new IP address may be shared with other users. Alternatively, a malicious individual could surreptitiously infiltrate an individual's computer or network, thereby associating his or her traffic with that of the innocent subscriber, under the same IP address.

Affidavit of Timothy Lethbridge, Tab 1-B at para. 13.

13. The result is that it may in some circumstances be possible to trace traffic or behaviour associated with an IP address to a particular address. However, it is not possible on that basis to impute that behaviour to a particular individual, including the account holder. An examination of the actual computers may be required.

Affidavit of Timothy Lethbridge, Tab 1-B at para. 7, 16.

BitTorrent

14. BitTorrent is a file-sharing protocol with many legitimate uses, and is particularly popular when large files must be transferred. Content is made available on the network and “you permit an essentially random set of other BitTorrent participant computers to share the load” rather than paying for expensive hosting. It is a way to better make use of scarce bandwidth.

Affidavit of Timothy Lethbridge, Tab 1-B at para. 18, 25, 27.

15. Essentially, once a user has obtained a portion of a file those pieces are made available by that user’s computer to other users for download. That said, by “sharing” a file you do not *automatically* upload any piece thereof. The system responds only to specific download requests from other users.

Affidavit of Timothy Lethbridge, Tab 1-B at para. 23, 24.

16. Unfortunately, it is possible to be tricked into downloading material via BitTorrent (perhaps clicking on a link in an email) or downloading material other than that which is intended. This is because one must generally download the entire file prior to viewing.

Affidavit of Timothy Lethbridge, Tab 1-B at para. 34, 35.

17. Similarly, to engage in “fair dealing” under copyright law in relation to a work the entire file must generally be downloaded.

Affidavit of Timothy Lethbridge, Tab 1-B at para. 36.

PART III – SUBMISSIONS

A. The Value of Anonymity

18. While not expressly enumerated in our *Charter*, the right to privacy permeates democratic values, is protected by sections 7 and 8 of the *Charter*, and enjoys strong protection at

common law. As noted by the Supreme Court of Canada: “[r]espect for individual privacy is an essential component of what it means to be ‘free’”. Our common law, as well as rules of discovery, must develop in a manner that is consistent with, and be informed by, the right to privacy and other *Charter* rights.

Cash Converters Canada Inc. v. Oshawa (City), 2007 ONCA 502, para. 29; *R. v. O’Connor*, [1995] 4 S.C.R. 411, paras. 112-113; *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, paras. 22, 30

19. Our highest court has recognized that, while litigation is inherently a privacy invasive process, participation in the litigation process does not amount to a waiver of privacy rights. Discovery processes must account for privacy rights and courts are obligated to ensure that the resulting “invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone”. As noted by the House of Lords:

Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place upon the litigant any harsher or more oppressive burden than is strictly required for the purpose of securing that justice is done.

A.B. v. Bragg Communications Inc., 2012 SCC 46; *Home Office v. Harman*, [1982] 1 All ER 532 (U.K. H.L.), per Keith, L.J., p. 540; *Juman v. Doucette*, 2008 SCC 8, paras. 24-25

20. Compelled identification of previously anonymous expression or activity implicates the right to privacy, as well as other rights such as the freedom of expression as protected by section 2(b) of the *Charter*. In *BMG Canada v. Doe*, the Federal Court of Appeal recognized the importance of ensuring adequate privacy safeguards are in place before anonymous defendants in file-sharing lawsuits are identified. As noted more recently in

Warman v. Fournier (Ont. Div. Ct.), identification disclosure requests of this nature can “engage[] the important Charter value of freedom of expression, as well as the right to privacy...” In addition, section 5(3) of the Personal Information Protection and Electronic Documents Act, which applies to customer information disclosed by ISPs, prevents organizations from disclosing personal information unless for purposes that “a reasonable person would consider are appropriate in the circumstances.”

BMG Canada Inc. v. Doe, 2005 FCA 193, para. 42; *Warman v. Wilkins-Fournier*, 2010 ONSC 2126 (Ont. Div. Ct.), paras. 32, 42; 1654776 *Ontario Limited v. Stewart*, 2013 ONCA 184, para. 49, leave to appeal sought, [2013] S.C.C.A. No. 225; *Personal Information Protection and Electronic Documents Act, S.C. 2000*, c. 5, section 5(3); *R. v. Ward*, 2012 ONCA 660, para. 42.

21. In general, copyright claims can be used with the intention of stifling expression and, hence, can similarly implicate freedom of expression and privacy. In *Warman v. Fournier* (F.C.), for example, the plaintiff sued a political discussion board for failing to prevent a regular but anonymous site participant from posting copies of the plaintiff’s work in order to critique the plaintiff’s political views.

Warman v. Fournier, 2012 FC 803, leave to appeal granted, *National Post v. Fournier*, Court File Nos. A-394-12 & A-395-12 (F.C.A.).

22. In the criminal context, the Saskatchewan and Ontario Courts of Appeal recently recognized the invasive potential inherent in attempts to enlist ISPs in the identification of their previously anonymous customers. In *R. v. Trapp* and *R. v. Spencer*, released concurrently, majority panels of the Saskatchewan Court of Appeal concluded that, when linked to anonymous online activity, pieces of subscriber identification information have great “potential to reveal much about the individual, and the individual’s activity in the home”. In *Trapp*, police access to such identification information violates a reasonable expectation of privacy. *Spencer*, currently under appeal to the Supreme Court, was

distinguished from Trapp on the basis of a clause in the ISP's terms of use reserving it the discretion to disclose customer information in order to satisfy a government request.

R. v. Spencer, 2011 SKCA 144, per Caldwell, J.A., paras. 22, 33, leave to appeal granted, [2012] S.C.C.A. No. 73; *R. v. Trapp*, 2011 SKCA 143, per Cameron, J.A., paras. 37, 40, 64

23. In *R. v. Ward*, the Ontario Court of Appeal held that providing even a 'snapshot' of an anonymous Internet user's activities – in that case, accessing images on a public website on three occasions – is “information which tends to reveal intimate details of the lifestyle and personal choices of the individual”. These otherwise reasonable privacy expectations, the Court found, are circumscribed by the ISP's discretion to voluntarily exercise its discretion in order to assist the police by identifying a customer – only if that discretion is exercised reasonably. An exercise of discretion will be reasonable where it complies with a “specific and narrow” police request that seeks to address offences that are “obviously serious”, such as offences which victimize children and the vulnerable.

R. v. Ward, 2012 ONCA 660, paras. 96, 98, 101-103

24. The freedom of expression and privacy rights of anonymous individuals are both implicated in file-sharing lawsuits. Identifying a previously anonymous file-sharer will reveal, at minimum, movie viewing preferences, implicating online anonymity as well as a 'right to read (or view) anonymously'. It was this interest in anonymous activity that the Ontario Court of Appeal referred to in holding that identifying a previously anonymous website visitor provides a “snapshot” into that individual's private life:

By going on the website carookee.com, the appellant engaged with others in a public forum that was open to literally anyone around the world. The appellant did so, however, anonymously. Anonymity “to some degree at least” is a feature of much Internet activity...

...information that would potentially identify the appellant, not merely as a Bell Sympatico subscriber, but a person who had engaged in certain activities on three specific occasions on the Internet. The information sought...would strip the appellant of his Internet anonymity on those three occasions...Information that has the very real potential to reveal activities of a personal and private nature is, in my opinion, “information which tends to reveal intimate details of the lifestyle and personal choices of the individual”.

R. v. Ward, 2012 ONCA 660, paras. 75, 92-93; *Tattered Cover, Inc. v. The City of Thornton*, 44 P.3d 1044, (Sup. Ct. Colorado, en banc, U.S.) (“With this case, we recognize that...the First Amendment...protect[s] an individual’s fundamental right to purchase books anonymously); *Warman v. Wilkins-Fournier*, 2010 ONSC 2126, (Ont. Div. Ct.), para. 20.

25. Much like the activity in *Ward*, file-sharing activity can reveal sensitive details of a person’s private life. These can include, for example, political or sexual preferences and lifting this veil of anonymity without lawful justification can therefore be highly offensive and, if broadly employed, may chill legitimate avenues of inquiry. This does not, of course, mean that anonymous file-sharers should be insulated from accountability for their activities. It does, however, mean that safeguards should be in place to ensure that the discovery process does not unnecessarily intrude on the anonymity of online activity.

BMG Canada Inc. v. Doe, 2005 FCA 193; *Jones v. Tsige*, 2012 ONCA 32; J. Cohen, “A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace”, (1996) 28 Conn. L. Rev. 981, Part IV; *Ingenuity 13 LLC, v. John Doe*, Case No. 2:12-cv-8333-ODW (JCx) (U.S. Dist. Ct. C. Dist. of Cal.).

26. In the present case, we note that the over 2,000 named Does are so named for their association with particular movies they are alleged to have downloaded from the Internet, in violation of the plaintiff’s copyright. Revealing the identities of the ISP subscribers (who may or may not have a connection to the Does) will implicate the subscribers privacy and freedom of expression by providing a ‘snapshot’ into the Does’ viewing preferences. Equating the subscriber with the Does themselves is merely “speculation and

guesswork” at this stage.

Cross Examination of Barry Logan, Q. 104-105 at p. 39-40.

27. We note, in this regard, that contrary to the criminal law examples referenced above, the ISP in question did not voluntarily provide the identity of its customers, the plaintiff’s request is not ‘specific and narrow’ as it includes the IP addresses of thousands of customers, and the alleged offence – copyright infringement – is not as “obviously serious” as the child exploitation violations at issue above.

B. The Test

28. The Applicants rely on *BMG v. Doe*, a 2005 decision of the Federal Court of Appeal involving allegations of copyright infringement in respect of the activities of anonymous internet users. CIPPIC intervened in that case at both the trial and appellate levels.

Applicant’s Memorandum of Fact and Law, *Applicant’s Motion Record*, Tab 4, para. 21.

29. The Applicant asks this Court to apply its interpretation of the test for granting a *Norwich* Order laid down in that decision. However, *Norwich* Orders are a rapidly evolving area of law. Subsequent decisions from Ontario and other jurisdictions have considered *BMG*, and refined the test to achieve a better balance among the interests of the plaintiffs, defendants, third parties, and justice.

(1) *BMG v. Doe*

30. In *BMG v. Doe*, the Federal Court of Appeal observed that orders for third party discovery could proceed either under Rule 238 or pursuant to an equitable bill of discovery. The Court had the following to say:

[28]An equitable bill of discovery is an equitable remedy that is discretionary in nature. In Lord Denning's words in *British Steel Corp. v. Granada Television Ltd.*, [1981] 1 All E.R. 417 (C.A.), at page 439, the bill of discovery "enables a person, who has been injured by wrongdoing, to bring an action to discover the

name of the wrongdoer."

[29]The concept has been accepted by this Court in *Glaxo Wellcome PLC v. M.N.R.*, 1998 CanLII 9071 (FCA), [1998] 4 F.C. 439 (C.A.) and was explained by Stone J.A., at paragraph 20:

The equitable bill of discovery is in essence a form of pre-action discovery. It is of ancient origin. It developed alongside the procedures for discovery which are ordinarily available in the course of litigation and which, it is worth noting, also originated in the courts of equity. This remedy permits a court, acting through its equitable jurisdiction, to order discovery of a person against whom the applicant for the bill of discovery has no cause of action and who is not a party to contemplated litigation. While it appears that an independent action for discovery cannot be brought against a person who is in the position of a "mere witness" or bystander to the cause of action, the case law suggests that a bill of discovery may be issued against an individual who is in some way connected to or involved in the misconduct. [Footnotes omitted.]

[30]The motions Judge, while finding that the motion was brought pursuant to rule 238, went on to hold that the criteria for determining whether an equitable bill of discovery should be issued, would be equally applicable to a proceeding brought under rule 238. I agree. In my view, the appellants could invoke either rule 238 or equitable bills of discovery and in either case, the legal principles relating to equitable bills of discovery would be applicable. The same issues are at stake in both procedures and there would seem to be no reason for not applying the same legal principles.

BMG Canada Inc. v. Doe, 2005 FCA 193, [2005] 4 RCF 81, paras. 28-30,

31. The Court of Appeal in that case laid down a test for granting an order pursuant to an application pursuant to Rule 238 or for an equitable bill of discovery (called a "Norwich Order" after the name of the English case that first gave rise to its issuance). Considering the entirety of the decision, the following test may be distilled from the Court's reasoning:
- a. The applicant must show that it has "a *bona fide* claim" against the proposed defendant, "i.e., that they really do intend to bring an action... based on the information they obtain, and that there is no other improper purpose for seeking the identity of these persons". (para.34)
 - b. The *bona fide* claim must be based on admissible evidence linking the IP

address(es) with the impugned action(s). (para.21)

- c. "There should be clear evidence to the effect that the information cannot be obtained from another source such as the operators of the named websites." (para.35)
- d. "The public interest in disclosure must outweigh the legitimate privacy concerns of the person sought to be identified if a disclosure order is made" (para.36)
- e. the information on which a request for identification is made (e.g., IP address) must be timely; no undue delay between investigation and motion for disclosure (para.43)
- f. plaintiffs must not collect more personal information than necessary for the purpose of their claim (para.44).

32. The Court of Appeal went on with respect to the contents of the disclosure order itself that (paras. 42-45):

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

In particular, 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, the court should consider making a confidentiality order or identifying the defendant by initials only.

33. While on the one hand, the Court of Appeal's careful review of the evidence and explicit regard for the privacy interests of subscribers was a positive development, other aspects of this decision are troubling. In particular, the Court of Appeal lowered the standard of case that applicants must make out in order to get a *Norwich* Order. In addition, while the Court did well to accommodate the privacy interests of subscribers, it failed to carve out scope for other values and interests of benefit to society, such as expressive interests and the wider interests of justice.

(2) Post-*BMG* Caselaw

34. A number of appellate courts since *BMG* have addressed the rules governing disclosure of identities of unnamed parties in discovery orders. In *Warman v. Fournier* – a case that CIPPIC again intervened in – the Divisional Court of Ontario considered an appeal from an order derived from a documentary discovery order in respect of a defamation action.

In that case, the Court arrived at a slightly different formulation of the test:

Given the circumstances in this action, the motions judge was therefore required to have regard to the following considerations: (1) whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the particular circumstances; (2) whether the Respondent has established a *prima facie* case against the unknown alleged wrongdoer and is acting in good faith; (3) whether the Respondent has taken reasonable steps to identify the anonymous party and has been unable to do so; and (4) whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered.

Warman v. Fournier et al., 210 ONSC 2126 at para. 34.

35. The decision is notable, among other reasons, for requiring the applicant to meet a *prima facie* standard, and for recognizing that competing interests beyond the privacy of the object of a discovery order may justify refusing disclosure. The Court in this case expressly recognized that legitimate interests in freedom of expression may also outweigh interests favouring disclosure.

36. *Warman* was subsequently considered by the Ontario Court of Appeal in its decision in *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184 (“*Stewart*”). The Court of Appeal in *Stewart* sanctioned the test for a *Norwich* Order adopted in *Warman*, but quibbled on the appropriate standard for the initial threshold test the applicant must meet. The Court of Appeal considered the *bona fide* test sufficient for the threshold test.

1654776 Ontario Limited v. Stewart, 2013 ONCA 184 at paras. 47-49 (*Stewart*)

37. *Stewart* is notable for its robust approach to the balancing inquiry articulated in *Warman*'s

test for a *Norwich* Order, properly expanding its ambit beyond privacy (*BMG v. Doe*) or freedom of expression values (*Warman*) to include broader interests of justice::

[77] The fifth *Norwich* factor is whether the interests of justice favour the obtaining of disclosure. This factor is broad and encompasses the interests of the applicant, the respondents, the alleged wrongdoers and the administration of justice.

Stewart at para.77.

38. We note that the decision in *Stewart* is being appealed to the Supreme Court of Canada.

It is our hope that the Supreme Court will see fit to grant leave and provide guidance on the issue of disclosing the identity of anonymous online speech of expressive value.

(3) The Proper Approach to *Norwich* Orders

39. The Applicant's proposed test for the granting of this Order slavishly follows the minimal requirements of Rule 238. However, as even the Court of Appeal found a decade ago in *BMG v. Doe*, other considerations come into play.

40. The test for the granting of an equitable bill of discovery is evolving in Canada and elsewhere. That said, the test may be derived from the decisions in *Warman* and *Stewart*, and requires that the applicant show that:

- (i) it has a valid, *bona fide*, or reasonable claim; or in cases such as this one where freedom of expression interests are engaged, that it has a *prima facie* case;
 - (ii) the respondents are somehow involved in the acts complained of;
 - (iii) the respondents are the only practical source of the information;
 - (iv) the respondents can be indemnified for any costs of disclosure; and
- (v) the interests of justice favour the obtaining of the disclosure.

Stewart at para. 25 (footnote omitted).

41. With respect to each of these elements, numerous factors may be taken into consideration. We offer brief comments on the first and fifth elements of this test.

(a) The threshold test: *Bona Fide v. Prima Facie*

42. CIPPIC observes that there is dispute in Canada about whether the appropriate threshold

test is merely a *bona fide* case or whether the court should require the applicant to make out a *prima facie* case. In addition, CIPPIC is of the view that the Ontario Divisional Court in *Warman* is correct, and that the interests of justice require that an applicant makes out a *prima facie* case.

43. Since its adoption by Canadian courts, other jurisdictions have recognized that, in order to effectively protect privacy rights, there is a need to assess the strength of a cause of action as a pre-requisite to issuing third party identification orders. The U.K. Supreme Court, on whose decision in *Norwich Pharmacal* Canadian courts have based this test, has held so. U.S. courts similarly require a ‘factual and legal’ basis for a cause of action prior to ordering third party identification. While the *prima facie* standard must be applied flexibly, so as not to defeat legitimate claims at an early stage of the investigation, it is a necessary component of the third party identification test.

Rugby Football Union v. Consolidated Information Services Ltd., [2013] 1 All ER 928, para. 17; *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (Cal. App. 2008).

44. In CIPPIC’s submission, little turns on this element of the test in the present application. Whether this Court is to require of the Applicant a *bona fide* case or a *prima facie* case, the Federal Court of Appeal’s evidentiary requirements remain. the Application must be based on sound supporting evidence:

- a. the information on which a request for identification is made (e.g., IP address) must be timely; there must be no undue delay between investigation and motion for disclosure (para. 43); and
- b. the information on which a request for identification is made must be based on admissible evidence linking the parties to the behaviour giving rise to the action (para. 21).

BMG v. Doe at paras. 21 and 43.

(b) The Respondent: The 2nd, 3rd and 4th Elements

45. These elements incorporate factors laid out in Rule 238(3)(a) and (b), but may be flexible enough to address wider issues relating to the nature of the respondent and of the information sought.

(c) The Interests of Justice

46. As the decision in *Stewart* makes clear, the test for the granting of an equitable bill of discovery is flexible as befits an equitable remedy. Consideration of the interests of justice accommodates multiple perspectives, including the privacy interests (*BMG v. Doe, Stewart*) and expressive interests (*Warman, Stewart*) of the subjects of the order, and the Court's own interests in the administration of justice (*Stewart*). In the present case, we will argue that fairness to the individuals whose personal information will be the subject of the Order must also be taken into account.

47. This element of the *Norwich* Order test also accommodates the factors identified in Rule 238(3)(c) and (d), namely

(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 person or to the other parties.

Federal Court Rules, Rule 238.

48. On the question of whether an applicant ought to provide notice to the individuals whose personal information will be the object of an application, CIPPIC submits that where an identity sought is that of a subscriber to an ISP, the court would gain from the potential for subscribers to become involved in the application. This will factor into consideration of the fifth element of the *Norwich* Order test.

49. In *Warman*, the Court stated:

Finally, as Strathy J. noted in *York University*, there may be circumstances in which it is appropriate that notice of a motion for disclosure be given to a John Doe defendant. The case law suggests that any such determination is to be made on a case-by-case basis, and we agree. In a defamation action, little would generally be added by such a step, because any defences that might be raised are not relevant to a determination as to whether a *prima facie* case has been made out. For such purpose, a plaintiff is required to establish only the elements of defamation within its control. However, in other cases a John Doe defendant may have compelling reasons for wishing to remain anonymous that are not immediately obvious, such as a risk to personal safety, and such grounds could not be put before the court absent notice.

Warman at para. 43.

50. Courts are required to consider the interests of justice in assessing applications for

Norwich Orders. Internet service providers are not well placed to advance the expressive or privacy interests of their subscribers, or to advance other balancing issues of justice.

Indeed, in the present case, TekSavvy has opted to stay out of the debate over the merits of the Applicant's application. A requirement for an applicant to provide notice to the targets of the *Norwich* Order serves this need. It may easily be done by providing the notice to the ISP with the request that it be passed along to the subscriber identified by IP address.

51. Finally, in considering the interests of justice in *Norwich* Orders, CIPPIC submits that applicants ought to be held to a standard of full and frank disclosure. This is particularly so where, as in the present application, the matter is unopposed and the context of the application raises questions of fairness to the defendants to the action, fairness to the individuals whose personal information is the object of the Order sought, and where the application raises considerations regarding the administration of justice. The Application is akin to an *ex parte* motion, such as other extraordinary equitable remedies like Anton

Pillar orders. Applicants owe a duty to the Court to provide full and frank disclosure so that the Court may be confident that it will issue a just order or none at all.

C. Application of the Test

52. CIPPIC will address its substantive submissions to the following points:

- a. The Applicant lacks a *bona fide* intent to bring an action against the John and Jane Does named in this application;
- b. The Application does not rest on sound evidence linking the parties to the activity complained of; and
- c. The interests of justice favour the dismissal of the Application.

(1) The Applicant's Case: *Bona Fides*

53. The Federal Court of Appeal has stated that the applicant must show that it has "a *bona fide* claim" against the proposed defendant, "i.e., that they really do intend to bring an action... based on the information they obtain, and that there is no other improper purpose for seeking the identity of these persons". (para.34)

54. This is a substantive requirement, and not merely a formality. The Court of Appeal sought evidence of a real intent to bring an action to avoid the spectre of applicants using the courts to pursue collateral purposes, such as disclosing the identity of an anonymous speaker for the purposes of seeking retribution or some other improper act.

55. CIPPIC submits that the Applicant lacks a *bona fide* intent to bring an action.

56. Merely filing a Statement of Claim is insufficient to establish a *bona fide* claim.

Regardless, CIPPIC notes that the Statement of Claim filed in this proceeding names no identifiable individuals and requires the applicant to bring no actual suit against any

named defendants. We note that in *Voltage Pictures LLC v. Jane Doe and John Doe*, 2011 FC 1024, a prior case involving the Applicant in which the Applicant successfully obtained a *Norwich* Order (albeit unopposed and in the absence of an intervener), the Applicant brought no action against a single named defendant. The Applicant has provided no evidence to explain this lack of subsequent action, did not put forward a witness from the Applicant who could speak to the issue, and indeed refused to examine questions on cross-examination that might assist the Court on this issue.

Voltage Pictures LLC v. Jane Doe and John Doe, 2011 FC 1024; Cross-Examination of Barry Logan, Q. 225, pp 78-79.

57. Merely hiring a lawyer to bring a motion is similarly insufficient to meet this threshold test.
58. In CIPPIC’s submission, this action and this application are not about protecting copyright. The Applicant did not follow standard industry procedure of issuing a notice of infringement to TekSavvy, subscribers, asking them to take down the works at issue and to cease infringing copyright. Instead, the Applicant moved immediately to file a Statement of Claim and launch this application.
59. This approach is consistent with a practice in the United States and United Kingdom called “speculative invoicing”, and organizations that engage in the practice are known colloquially as “copyright trolls”. The practice is described colourfully in the judgement of Justice Otis D Wright III in the case of *Ingenuity 13 LLC, v. John Doe*, Case No. 2:12-cv-8333-ODW (JCx) (U.S. Dist. Ct. C. Dist. of Cal.):

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.

Ingenuity 13 LLC, v. John Doe, Case No. 2:12-cv-8333-ODW (JCx) (U.S. Dist. Ct. C. Dist. of Cal.) at p. 1. For a general overview of the phenomenon of the copyright troll, see Shyamkrishna Balganesh, "The Uneasy Case Against Copyright Trolls" 86 S. CAL. L. REV. (forthcoming May 2013), available online: Social Sciences Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2150716>.

60. The Applicant, Voltage Pictures LLC, has itself been characterized in judgements disapproving of the practice in this way. In *Safety Point Products, Llc et al. v. Does 1-14, Does 15-96, Does 97-177, & Does 178-197*, the Court observed of Voltage's litigation before it:

Because IP addresses are the only identifiers of peers within a BitTorrent system, it is difficult, if not impossible, to learn the true identities of the peers in a swarm. To pursue litigation, plaintiffs in BitTorrent suits must attempt to get early discovery to learn of the actual identities of the unnamed defendants. The requests have been the subject of much criticism, for the lawsuits are rarely litigated. Rather, plaintiffs seek to take advantage of the resources of federal courts to force small, individual settlements. [...]

Courts have been troubled by what amounts to be a new business model employed by production companies "misusing the subpoena powers of the court, seeking the identities of the Doe defendants solely to facilitate demand letters and coerce settlement, rather than ultimately serve process and litigate the claims." This unseemly practice is made worse by the frequent practice of joining hundreds or thousands of defendants in a suit, saving plaintiffs tens of thousands of dollars in filing fees. It is in this environment where courts must take every caution to ensure that the keys to the doors of discovery are not blithely given to parties with other intentions.

Safety Point Products, LLC et al. v. Does 1-14, Does 15-96, Does 97-177, & Does 178-197, Case Nos. 1:12-CV-2812, 1:12-CV-2820; 1:12-CV-2831; 1:12-CV-2894 (United States District Court Northern District of Ohio) at p. 4, 8 (citations omitted)..

61. It is this troubling new business model that the Applicant and its accomplice Canipre seek to bring to Canada through this application.

62. CIPPIC sought details of the arrangement between Voltage Pictures and Canipre. Mr. Logan, the principal of Canipre, refused to answer any question on cross-examination

that could assist the Court in understanding the nature of the undertaking that involves this application. CIPPIC asks the Court to draw adverse inferences from all such refusals.

Cross Examination of Barry Logan, Qs. 195-205.

63. Voltage Pictures has a long track record in the United States of launching multi-defendant lawsuits, in addition to the suit addressed in the *Safety Point Products* decision noted above. By CIPPIC's calculation, Voltage has sued at least 28,271 John and Jane Does in the United States in at least 22 separate cases.

Affidavit of Alexander Cooke, paras. 10-11.

64. CIPPIC has been unable to find a single copyright infringement judgement amongst all of these Does in the legal judgement databases that we have access to.

65. It would appear from public statements made by Mr. Logan, the principal of Canipre and Voltage's principal affiant in the present application, that Canipre may be central to the business model underlying this litigation.

66. In cross-examination, CIPPIC asked Mr. Logan to indicate whether he had in fact stated certain quotes attributed to him, and whether they were true. The quotations referenced this case and Canipre's business model. In all cases, Mr. Logan refused to answer.

CIPPIC asks the Court to draw adverse inferences from all such refusals.

Cross Examination of Barry Logan, Qs. 205-240, and Exhibit 2.

67. Copyright trolls typically demand sums in the range of thousands of dollars. For example, a recent case involving Voltage Pictures includes a demand letter for \$US 7,500. In the present case, Voltage has not come forward with any indication of what it intends to demand of the ISP subscribers who would be identified (and who may or may

not be proper defendants). In the absence of such openness and in light of the history of this company in other jurisdictions, it is submitted that an adverse inference regarding the nature of the demands would be warranted.

Voltage Pictures, LLC, v. Does 1-198, Does 1-12, Does 1-34, Does 1-371, (6:13-cv-290-AA, 2:13-292-AA, 1:13-293-AA, 3:13-295-AA) (U.S. Dist. Ct. Oregon)

68. The Canadian *Copyright Act* was recently amended to reduce the statutory damages available against consumers in cases of non-commercial infringement. Under the new legislation, consumers may be subject to statutory damages of between \$100 and no more than \$5,000 for all infringements. In other words, consumer infringement of multiple works still leads to a cap of no more than \$5,000 in damages.

Copyright Act, R.S.C. 1985 c. C-42 (as amended), s. 38.1(1)(b)

69. There is no caselaw in Canada on the appropriate award of damages for so minor an infringement as downloading or making available a single copy of a motion picture. The most relevant case we have found comes from a New Zealand tribunal specially devised to address small scale infringement from file sharing. In that case, the Court awarded damages for infringement of three works totalling \$NZ 616.57 inclusive of the regulatory fine, reimbursement of the application fee, a deterrent sum (3 x \$120), and a contribution towards the applicant's legal costs. This is an order of magnitude beneath what the typical copyright troll seeks in demand letters.

Recording Industry Association of New Zealand Inc. v. Enforcement Number: Telecom NZ 2592, [2013] NZCOP 2.

70. CIPPIC submits from all of the above that the Applicant holds no *bona fide* interest in pursuing legal redress. Instead, in league with Canipre, Voltage is embarking on a speculative invoicing scheme, profiting not from damages awards, but from settlements

entered into by consumers anxious to avoid the cost and uncertainty of being sued.

(2) The Applicant's Case: Insufficient Evidence

71. It is worth recalling that the applicants' case failed in *BMG v. Doe*, among other reasons, because the applicants failed to include admissible evidence (at para. 21):

Much of the crucial evidence submitted by the appellants was hearsay and no grounds are provided for accepting that hearsay evidence. In particular, the evidence purporting to connect the pseudonyms with the IP addresses was hearsay thus creating the risk that innocent persons might have their privacy invaded and also be named as defendants where it is not warranted. Without this evidence there is no basis upon which the motion can be granted and for this reason alone the appeal should be dismissed.

BMG v. Doe (FCA) at para. 21.

72. In this case, the Applicant has failed to provide complete and first hand evidence of *how* the crucial evidence – the IP addresses of the Does – was gathered and linked to other evidence substantiating the Applicant's allegations of infringement.

73. The crucial paragraphs of the affidavit of Mr. Logan (paras. 9-11) merely state that certain software “was run” over a 2 month time period. Mr. Logan does not depose as to who ran the software, who controlled its input and output, or who connected the IP addresses to the activity complained of. At best, Mr. Logan has provided hearsay evidence as to the functionality of technology owned, controlled and operated by unnamed third parties.

74. Rule 81 of the Federal Court Rules states that

81. (1) Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefor, may be included.

(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.

75. Mr. Logan's affidavit violates Rule 81 since it relies upon fact beyond his personal

knowledge, and he has failed to identify facts based on his belief and state the grounds upon which his belief is based.

76. While plainly admissible evidence is required linking the defendants to the impugned activity, similarly admissible evidence must be before the Court linking the plaintiff to the claim.
77. The Applicant has failed to link itself to the rights alleged to have been infringed. The Applicant claims that it owns copyright in certain cinematographic works. However, the only evidence tendered in support of that claim is Mr. Logan's statement (at para. 7 of his affidavit) that Voltage "has the rights to" certain copyrighted works "in Canada".
78. Copyright in Canada in first instance rests with authors, not with film production companies. Section 34.1 creates a statutory presumption that the author is the owner of copyright in a work subject to litigation. Copyright in cinematic works is typically transferred from authors (directors) to subsequent owners (film companies such as the Applicant) contractually. However, no evidence has been tendered regarding such transfers. In litigation, proof of ownership is typically established through the entry into evidence of copyright registrations. No registrations have been tendered. On the basis of the evidentiary record in this proceeding, copyright in the works in question rests with their authors, not with Voltage.
79. Mr. Logan is not an employee of Voltage Pictures LLP and is not in a position to possess firsthand knowledge of any transfers of copyright ownership from the authors of these cinematographic works to the plaintiff. Such evidence could only be hearsay, and his affidavit is not supported by any identification of the source of his belief in violation of Rule 81.

(3) The Interests of Justice

80. Assessing the interests of justice, we first consider the Applicant's interest. The Applicant's interest in this case is weak at best. As argued above, The Applicant is interested in exploiting its speculative invoicing venture with its facilitator, Canipre. The Applicant lacks a *bona fide* case, and is merely interested in exploiting its speculative invoicing scheme.

81. The interests of the John and Jane Does in this case are numerous.

82. In Part II, Section A of this Memorandum, CIPPIC offered reasons why the content consumption habits of individuals enjoy substantial privacy value. However, it is crucial to keep in mind that the Order the Applicant seeks will not provide the identity of an alleged infringer, but merely the name and address of a TekSavvy subscriber associated with the IP address collected by Canipre and alleged by the Applicant to be associated with an infringing download. In other words, the Order will not disclose the identities of John and Jane Does, but merely provide an avenue for further inquiry. However, any such further inquiry is unlikely to occur as the cost of a litigation defence will be far greater than the Plaintiff's "settlement" demand.

83. However, the majority of mass file-sharing litigation in the United States is now being addressed through an assertion of the civil rights of defendants. US Courts are dismissing applications such as the present one on the basis of the multiplicity of defendants being improperly joined.

See, e.g., Voltage Pictures, LLC, v. Does 1-198, Does 1-12, Does 1-34, Does 1-371, (6:13-cv-290-AA, 2:13-292-AA, 1:13-293-AA, 3:13-295-AA) (U.S. Dist. Ct. Oregon), Safety Point Products, LLC et al. v. Does 1-14, Does 15-96, Does 97-177, & Does 178-197, Case Nos. 1:12-CV-2812, 1:12-CV-2820; 1:12-CV-2831; 1:12-CV-2894 (United States District Court Northern District of Ohio), and the many cases cited therein.

84. CIPPIC asserts that these same interests arise in the present case. The Applicant has named over 2000 Does, but has provided no factual support whatsoever for joining the defendants in a single action. Indeed, the factual evidence relied upon by the Applicant demonstrates that the evidence against these Does was collected over a 2 month period. The Applicant has not entered even a shred of evidence linking any of these Does together beyond the common denominator of their Internet Service Provider.

Affidavit of Barry Logan, para. 8.

85. In one of the American Voltage cases dismissing the suit on the basis of improper joinder, the Court, after first observing Voltage's failure to assert a common factual basis for joining multiple Does, went on to comment on the fundamental unfairness of the process:

Even if Plaintiffs could meet the Rule 20(a)(2) factors for permissive joinder, this Court would nevertheless sever Defendants because joinder would otherwise deprive the Court of a just result. As noted above, courts can exercise discretion in weighing the effect of joinder on fundamental fairness. Permitting joinder of the unnamed defendants violates a sense of fairness, as each unnamed defendant might have different defenses to the suit, necessitating a mini-trial to fully present each defendant's specific evidence. In addition, joinder of dozens of defendants would extend trial proceedings and could serve to confuse the fact-finder. It is hard to imagine how dozens or hundreds of defendants, most likely unfamiliar with civil litigation, would be able to appreciate their procedural rights in such a trial.

Safety Point Products, LLC et al. v. Does 1-14, Does 15-96, Does 97-177, & Does 178-197, Case Nos. 1:12-CV-2812, 1:12-CV-2820; 1:12-CV-2831; 1:12-CV-2894 (United States District Court Northern District of Ohio) at p. 4, 8 (citations omitted)..

86. One might answer that the Applicant in the present case might choose to sever individual Does once they have been identified through the instrumentality of a *Norwich* Order. That would, however, ignore the reality of how speculative invoicing schemes work. The object of the suit is to obtain the Order and send demand letters. It is not to then litigate against Does who refuse to settle.

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PART V – LIST OF AUTHORITIES

Statutes

Copyright Act, R.S.C., 1985, c. C-42, ss 2 (definition of “cinematographic work”), 13, 38(1)

Federal Court Rules, SOR 98/106, rr. 81, 238

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5,

Caselaw

1654776 Ontario Limited v. Stewart, 2013 ONCA 184, [2013] OJ No 1362 (QL)

A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 SCR 567

BMG Canada Inc. v. Doe, 2005 FCA 193, [2005], 4 RCF 81

Cash Converters Canada Inc. v. Oshawa (City), 2007 ONCA 502

Home Office v. Harman, [1983] 1 AC 280 (UK HL) [1982] 1 All ER 532

Ingenuity 13 LLC v. John Doe, Case No. 2:12-cv-8333-ODW, 2013 WL 1898633 (JCx) (CD Cal 2013)

Jones v. Tsige, 2012 ONCA 32, [2012] OJ No 148

Juman v. Doucette, 2008 SCC 8, 290 DLR (4th) 193

Krinsky v. Doe 6, 159 Cal. App. 4th 1154, 72 Cal Rptr 3d 231 (Cal. App. 6 Dist 2008)

M.(A.) v. Ryan, [1997] 1 S.C.R. 157, [1997] SCJ No 13

R. v. O’Connor, [1995] 4 S.C.R. 411, [1995] SCJ No 98

R. v. Spencer, 2011 SKCA 144, [2011] SJ No 729

R. v. Trapp, 2011 SKCA 143, [2011] SJ No 728

R. v. Ward, 2012 ONCA 660, [2012] OJ No 4587

Recording Industry Association of New Zealand Inc. v. Enforcement Number: Telecom NZ 2592, [2013] NZCOP 2

Rugby Football Union v. Consolidated Information Services Ltd., (formerly Viagogo Ltd) (in liquidation), [2012] UKSC 55, [2013] 1 All ER 928

Safety Point Products, LLC et al. v. Does 1-14, Does 15-96, Does 97-177, & Does 178-197, Case Nos. 1:12-CV-2812, 1:12-CV-2820; 1:12-CV-2831; 1:12-CV-2894 (ND Ohio 2013)

Tattered Cover, Inc. v. The City of Thornton, 44 P.3d 1044, (Colo Sup Ct, en banc, 2002), 30 Media L Rep 1656

Voltage v. Doe, 2013 FC 112

Voltage Pictures LLC v. Jane Doe and John Doe, 2011 FC 1024

Voltage Pictures, LLC, v. Does 1-198, Does 1-12, Does 1-34, Does 1-371, (6:13-cv-290-AA, 2:13-292-AA, 1:13-293-AA, 3:13-295-AA) (D Oregon 2013)

Warman v. Fournier, 2012 FC 803, [2012] FCJ No 851

Warman v. Fournier et al., 210 ONSC 2126, [2010] OJ No 1846.

Secondary Sources

J. Cohen, “A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace”, (1996) 28 Conn. L. Rev. 981

S. Balganes, “The Uneasy Case Against Copyright Trolls” (2013) 86 S. CAL. L. REV. (forthcoming)

Appendix A

Statutes Relied Upon

<p><i>Copyright Act</i>, R.S.C. c. C-42, as amended.</p> <p>OWNERSHIP OF COPYRIGHT</p> <p>13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.</p> <p>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, [...] (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.</p> <p>34.1 (1) In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it, [...] (b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.</p>	<p>Loi sur le droit d'auteur, R.S.C., 1985, c. C-42 L.R.C. (1985), ch. C-42</p> <p>POSSESSION DU DROIT D'AUTEUR</p> <p>13. (1) Sous réserve des autres dispositions de la présente loi, l'auteur d'une œuvre est le premier titulaire du droit d'auteur sur cette œuvre.</p> <p>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: [...] b) dans le cas des violations commises à des fins non commerciales, pour toutes les violations — relatives à toutes les œuvres 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 que le tribunal estime équitable en l'occurrence.</p> <p>34.1 (1) Dans toute procédure civile engagée en vertu de la présente loi où le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur: [...] b) l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur.</p>
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<p style="text-align: center;"><i>Federal Court Rules, SOR/98-106</i></p> <p>81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.</p> <p>(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.</p>	<p style="text-align: center;"><i>Règles des Cours fédérales. DORS/98-106</i></p> <p>81. (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.</p> <p>(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</p>
<p style="text-align: center;"><i>Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5,</i></p> <p>(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.</p>	<p style="text-align: center;"><i>Loi sur la protection des renseignements personnels et les documents électroniques S.C. 2000, c. 5 L.C. 2000, ch. 5</i></p> <p>(3) L'organisation ne peut recueillir, utiliser ou communiquer des renseignements personnels qu'à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances.</p>