

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

B E T W E E N:

**VOLTAGE HOLDINGS, LLC**

APPELLANT

- and -

**JOHN DOE#1**

RESPONDENTS

**MEMORANDUM OF ARGUMENT**  
**OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC**  
**INTEREST CLINIC**  
**(Motion for leave to be added as a party)**

*Pursuant to Rules 18(5) and 47 of the Rules of the Supreme Court of Canada*

**PART I – FACTS**

**A. OVERVIEW**

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) seeks an Order granting it leave to be added as a party in this proceeding in order to provide the Judge and this Court with the adversarial perspective necessary to adjudicate the questions at issue.
2. The Appellant seeks leave to appeal to this Court a matter arising from a motion for default judgement. None of the Doe respondents to the Appellant’s motion for default judgement participated in the courts below, and none are anticipated to do so before this Court. The Appellant’s motion seeking leave to appeal the matter to this Court is unopposed.
3. CIPPIC intervened on the merits before the motions judge and in the Federal Court of Appeal. It was the only party to provide those courts with adverse arguments. CIPPIC’s arguments carried the day. The Appellant, in effect, is seeking leave to appeal decisions derived from CIPPIC’s position. No party is better placed than CIPPIC to join the issue and provide the adverse legal argument “necessary to enable the Court to adjudicate the questions in issue”.

4. CIPPIC’s motion seeks to be added as a party to the proceeding, not just to the application for leave to appeal. If leave is granted, CIPPIC would be treated as if it were a Respondent, stepping into their shoes for the purposes of fulfilling that role as envisioned by the *Rules*: filing a responding factum on the merits and appearing before the Court to make adverse argument grounded in the public interest.

5. In the alternative, CIPPIC would seek to be added as an intervener with leave to address the merits.

## **B. THE PROPOSED PARTY – CIPPIC**

6. CIPPIC is a legal clinic based at the Centre for Law, Technology and Society in the University of Ottawa’s Faculty of Law. Its core mandate is to advocate in the public interest where the law intersects with technology in ways that may significantly affect individuals. CIPPIC’s advocacy and public outreach activities have extensively engaged matters relating to Internet intermediaries, ISP customer protection, privacy and copyright enforcement, such as those at issue in this appeal.

### **Affidavit of Christian Clavette, sworn on December 22, 2023 (“Clavette Affidavit”), Motion Record, Tab 2**

7. Some of CIPPIC’s most relevant expertise includes: its participation in this matter on the merits in both lower court decisions (*Voltage Holdings v Doe #1*, 2023 FCA 194, 2022 FC 827); its participation as an intervener in similar proceedings (*Salna v Voltage Pictures*, 2023 FC 893, 2021 FCA 176 and *Rogers Communications v Voltage Pictures*, 2018 SCC 38); and its broader expertise on copyright and the specific impact of intermediary-based rights enforcement on digital expression and legal doctrine. This experience includes participation in regulatory proceedings before the CRTC, testimony before House of Commons Legislative Committees, and its membership in the Civil Society Information Society Advisory Council to the OECD.

### **Clavette Affidavit, Motion Record, Tab 2**

8. CIPPIC is well-placed to articulate public interest positions adverse to those advanced by the proposed Appellant in this matter, which directly intersect with its mandate and institutional expertise.

## **PART II – STATEMENT OF QUESTIONS AT ISSUE**

9. The only issue before the Court in this motion is whether CIPPIC should be added as a party in

this proceeding.

### PART III – ARGUMENT

10. **Rule 18(5)** permits the Court to “order that a party be added or substituted where, in the opinion of the Court [it] is necessary to enable the Court to adjudicate the questions in issue”.

*Rules of the Supreme Court of Canada*, SOR/2002-156.

11. CIPPIC’s addition as a party is necessary to enable the Court to decide the Appellant’s application for leave to appeal for four reasons:

- (a) none of the named respondents have indicated any intention to contest the application for leave to appeal;
- (b) CIPPIC is the only party with a real interest in the debate for the purposes of the application for leave to appeal;
- (c) CIPPIC has actively participated in the debate and provided opposing submissions, based in public interest considerations, in the lower courts; and
- (d) CIPPIC’s addition as a party is in the interests of justice because it will provide a perspective adverse to that of the Appellant and so is necessary to complete the adversarial process envisioned by the *Rules*.

*Canadian Pacific Ltd. v. Montreal Urban Community*; [2001] 3 S.C.R. 426, 2001 SCC 74 paras 2, 5; *Alliance for Marriage and Family v. A.A.*, [2007] S.C.R. 124, 2007 SCC 40 at para 11; *Rules of the Supreme Court of Canada*, SOR/2002-156, rule 18(5).

#### A. NONE OF THE NAMED RESPONDENTS INTEND TO CONTEST

12. None of the proposed respondents have come forward to defend themselves or produced any written objections against the action throughout its entire procedural history. The “Does”, identified only by their Internet Protocol (IP) addresses, have pled at neither the Federal Court nor the Federal Court of Appeal. If CIPPIC is not added as a party, no other party would dispute the application for leave to appeal.

Clavette Affidavit, Motion Record, Tab 2 at para. 6; *Canadian Pacific Ltd. v. Montreal*

*Urban Community*, [2001] 3 S.C.R. 426, 2001 SCC 74 at [para 2](#).

## **B. CIPPIC IS THE ONLY PARTY WITH A REAL INTEREST IN THE DEBATE**

13. This Appeal arises in the context of a motion for default judgement in respect of mass file-sharing copyright litigation. None of the Respondents came forward defend the claim or to participate in either the hearing of the motion or the subsequent appeal. Given the public interest considerations raised in the context of an undefended action, CIPPIC sought and was granted leave to intervene on the merits by both the Federal Court and Federal Court of Appeal.

14. CIPPIC is the only party with a real interest in the debate for the purposes of the application for leave. As an experienced litigant whose mandate is to advance technology law in the public interest, and as an intervener in the lower courts, CIPPIC has the legal interest and expertise required to become a useful party to this proceeding. CIPPIC's expertise in this matter, and its mandate, places it in a unique position to advance an adverse perspective in this matter.

*Clavette Affidavit, Motion Record, Tab 2 at ; *Canadian Pacific Ltd. v. Montreal Urban Community*, [2001] 3 S.C.R. 426, 2001 SCC 74 at [para 5](#).*

15. CIPPIC's interest in this proceeding is genuine and arises from its long history of involvement in online expression, balanced copyright, and the enforcement role played by various Internet intermediaries with respect to user-initiated rights infringement. CIPPIC's historic involvement has included substantial on-the-ground experience advising entities impacted by competing intermediary-based enforcement models and has included numerous high-profile interventions in appeals that defined a rights-enforcement role for Internet intermediaries. CIPPIC has a comparable record of institutional involvement in assisting the Court in interpreting the *Copyright Act* such that the legislative balance between copyright and users' rights is fully realized. CIPPIC will draw on this institutional expertise to provide the Court with a fulsome understanding of the issues before it.

*Clavette Affidavit, Motion Record, Tab 2 at para. 5.*

## **C. CIPPIC HAS PARTICIPATED ACTIVELY IN THE DEBATE**

16. CIPPIC was the only party to provide opposing submissions as an intervener in the lower courts. In the complete absence of the Doe Respondents, CIPPIC had an obligation within its

mandate to intervene in the lower courts. Its intervention was well received at both the Federal Court and the Federal Court of Appeal. Throughout the entire procedural history of the default motion, CIPPIC has been the only party acting adverse to the Appellant's position.

*Canadian Pacific Ltd. v. Montreal Urban Community*, [2001] 3 S.C.R. 426, 2001 SCC 74 at [para 5](#); Clavette Affidavit, Motion Record, Tab 2 at [para. 6](#).

17. CIPPIC has been a useful party in this proceeding. In the lower courts, CIPPIC's submissions were reflected in the Court's reasons. Its written submissions and oral argument helped the courts decide to dismiss the Appellant's motion at the Federal Court and at the Federal Court of Appeal.

*Canadian Pacific Ltd. v. Montreal Urban Community*, [2001] 3 S.C.R. 426, 2001 SCC 74; Clavette Affidavit, Motion Record, Tab 2 at [para. 5](#).

18. CIPPIC's mandate is to advocate in the public interest on matters arising at the intersection of law and technology. CIPPIC has significant expertise in the matters at issue in this proceeding. CIPPIC has been particularly useful to courts in similar copyright infringement litigation making it well placed to speak to the public interest concerns raised in the Appellant's application for leave to appeal.

Clavette Affidavit, Motion Record, Tab 2 at paras. 8-10.

#### **D. CIPPIC'S ADDITION AS A PARTY IS NECESSARY IN THE INTERESTS OF JUSTICE**

19. To move forward without an adversarial process and without any Respondent risks upsetting the legislative balance between user rights and copyright which is at the heart of the *Copyright Act*.

20. CIPPIC's submissions will provide the Court with a valuable perspective necessary to decide the Appellant's application for leave to appeal. Considering its involvement in these proceedings and its expertise in the matter, CIPPIC is uniquely placed to inform the Court on the appropriateness of granting leave to appeal. If CIPPIC is not added as a party, then this action will go undefended. It is in the interests of justice to have an adversarial proceeding to fully inform the Court on the issues raised in this application for leave to appeal.

*Canadian Pacific Ltd. v. Montreal Urban Community*, [2001] 3 S.C.R. 426, 2001 SCC 74 at [para 5](#).

## E. IN THE ALTERNATIVE, CIPPIC ASKS TO BE GRANTED INTERVENER STATUS

21. In the alternative, CIPPIC asks this Court for leave to intervene in this matter with leave to address the merits. For the reasons stated above, CIPPIC has an interest in the outcome of this proceeding and CIPPIC's intervention will be useful and different from those of other parties.

*Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to intervene)*  
(SCC), [1989] 2 SCR 335; *Rules of the Supreme Court of Canada, Rule 55.*

## F. CIPPIC'S PROPOSED SUBMISSIONS

22. If granted leave, CIPPIC proposes to offer the following submissions:

(i) The Applicant seeks to appeal a rejection of its motion for default judgement, a discretionary decision of a motions judge that is by definition controlled by its particular facts. The Applicant couches as of national importance a theory of authorization of copyright infringement that is only novel because it seeks to overturn questions of statutory interpretation well-settled by decisions of this Court, and to audaciously resuscitate a theory of authorization not grounded in statutory interpretation and already explicitly rejected by this Court.

(ii) The Applicant's motion for summary judgement was dispensed with through the routine and competent assessment of the evidence by a motions judge engaging in the uncontroversial application of law settled by unanimous decisions of this Court. Nothing in the decisions below indicates that this matter is of a nature or significance or so important as would merit this Court's attention.

(iii) The Applicant raises two issues for this Court's consideration:

- What is a copyright owner's evidentiary burden in default judgment of anonymous online infringement?
- Can a subscriber be liable for authorizing infringement with notice of the infringement?

(iv) If CIPPIC is successful in its motion, it would argue as follows with respect to the

question of a copyright owner's evidentiary burden in a default judgment proceeding:

- The Applicant requests the Supreme Court interfere with a decision of a motions judge who found simply that the Applicant had not tendered sufficient evidence to meet its burden of proof under the Copyright Act and the Federal Court Rules.
- The Applicant claims that it has provided "all that was possible".
- The Applicant ignores that the motions judge identified additional avenues of discovery available to it. The Applicant could have used many of the Federal Court Rules discovery mechanisms available to it to obtain additional evidence that might have permitted the court to draw conclusions about liability or, crucially, innocence.
- The Applicant asks this Court to displace the motions judge's inference drawing exercise with one of its own devising, and in so doing evade the work of providing evidence of liability.
- The Applicant alleges that the Federal Court of Appeal reverses the law of negative inferences established by this Court. CIPPIC would argue that it did no such thing, instead routinely applied those decisions.
- The decision under appeal is fact specific. Indeed, cases relied upon by the Applicant in the courts below demonstrate the kinds of additional facts necessary to permit the motions judge to draw the kind of inference the Applicant sought of the motions judge. The decisions below applied a fair and proportionate procedure. The Applicant's allegation that the motion judge's dissatisfaction with the Applicant's evidence places Canada in violation of international treaty obligations is without merit. The international framework of intellectual property treaties do not do away with the Applicant's obligation at law to prove its case on a balance of probabilities with clear and cogent evidence.

(v) If CIPPIC is successful in its motion, it would argue as follows with respect to the question

of internet subscriber liability for authorization:

- The decisions below do not address novel or unusual questions of law, but rather involve the routine application of Supreme Court of Canada precedents.
- The Applicant's position on authorization amounts to the imposition of liability for failing to police activity involving one's technology once one is deemed to have had notice of a mere allegation of copyright infringement. The Applicant's position on authorization seeks to overturn an explicit precedent directly on point – *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (*CCH*) no less – and replace its test with one this Court identified and rejected in that decision on the basis of the balance principle animating copyright law as a whole.
- The Applicant's reliance on the decision of this Court in *SOCAN v CAIP* for support for overturning *CCH* is misguided. In considering the special case of ISPs intermediary role in content transmission, Justice Binnie mused that ISPs could be inferred to authorize infringement in a proper case where, as owner and sole controller of the infrastructure of transmission, an ISP failed to respond to notice of infringing content by "taking it down". However, the Court clarified that all "would depend on the specific circumstances". This passage – which was obiter – addressed the special case of ISP liability and arose in the context of policy debates alive at the time about whether Canada should adopt a "notice and takedown" scheme – the subject of Justice Binnie's speculation – or a notice and notice system which involved no takedown of infringing content. Parliament rejected the approach contemplated by Justice Binnie. The Applicant asks this Court to ignore Parliament's rejection of that policy option in respect of high tech infrastructure services and impose liability on the heads of ordinary Canadians who subscribe to home internet services.
- This does not raise a novel issue of national importance, but seeks to overturn law well



settled by a unanimous Supreme Court the most important decision in all of Canadian copyright law and reanimate a settled debate on a factual record – that the motions judge already found inadequate - that is specific to this case.

- The Applicant’s reliance on the principle of technological neutrality in support of this position is similarly misplaced; this principle supports the consistent application of the *CCH* test for authorization in internet contexts.
- The Applicant concludes on this point that it is of national importance that “this Court’s jurisprudence evolve with the times”. However, scope of the authorization right is a matter of statutory interpretation. It is not common law. Parliament set the authorization right in its enactment, and it remains consistent with Canada’s international Treaty obligations. This Court has interpreted that enactment. Nothing in the text, context or purpose of the authorization right – not the Act’s legislative history, nor decisions of this Court – provide a hint that this Court was wrong in *CCH* to explicitly reject the Applicant’s proposed policing test for authorization.

#### **PART IV – COSTS**

23. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to be added as a party is granted.

#### **PART V – ORDER SOUGHT**

24. CIPPIC respectfully requests an Order from this Court that it be added as a Party to this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of December, 2023.



David Fewer

Samuelson Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)  
University of Ottawa, Faculty of Law, Common Law Section  
57 Louis Pasteur Street

Ottawa, ON K1N 6N5

Tel: (613) 562-5800 x 2914

Fax: (613) 562-5417

Email: [dfewer@uottawa.ca](mailto:dfewer@uottawa.ca)

**Counsel for CIPPIC**

## PART VI – TABLE OF AUTHORITIES

*Authority**Reference in Argument*

|   | <b><u>Cases</u></b>  |                        |
|---|--|------------------------|
| 1 | <a href="#"><i>Alliance for Marriage and Family v. A.A.</i>, [2007] S.C.R. 124, 2007 SCC 40</a>            | 11                     |
| 2 | <a href="#"><i>Canadian Pacific Ltd. v. Montreal Urban Community</i>, [2001] 3 S.C.R. 426, 2001 SCC 74</a> | 11, 12, 14, 16, 17, 20 |
| 3 | <a href="#"><i>Reference re Workers' Compensation Act, 1983 (Nfld.)</i>, [1989] 2 SCR 335</a>              | 21                     |
|   | <b><u>Legislation</u></b>  |                        |
| 4 | <a href="#"><i>Rules of the Supreme Court of Canada</i>, SOR/2002-156, ss 18(5), 47, 55, 57(2)</a>         | 6, 22                  |

## PART VII – STATUTES AND REGULATIONS

| <i>Rules of the Supreme Court of Canada,</i><br><b>SOR/2002-156</b>   | <i>Règles de la Cour suprême du Canada,</i><br><b>DORS/2002-156</b>   |
|---|---|
| <p>18 (5) In any proceeding, the Court or a judge may order that a party be added, substituted or removed if, in the opinion of the Court or the judge, the addition, substitution or removal is necessary to enable the Court to adjudicate the questions in issue.</p>  | <p>18 (5) Dans toute procédure, la Cour ou un juge peut ordonner l'adjonction, la substitution ou le retrait d'une partie si la Cour ou le juge l'estime nécessaire pour permettre à la Cour de trancher les questions en litige.</p>   |
| <p>47 (1) Unless otherwise provided in these Rules, all motions shall be made before a judge or the Registrar and consist of the following documents, in the following order:</p> <p>(a) a notice of motion in accordance with Form 47;</p> <p>(b) any affidavit necessary to substantiate any fact that is not a matter of record in the Court;</p> <p>(c) if considered necessary by the applicant, a memorandum of argument in accordance with paragraph 25(1)(c), with any modifications that the circumstances require;</p> <p>(d) if, in support of the motion, the applicant</p> | <p>47 (1) Sauf disposition contraire des présentes règles, toute requête est présentée à un juge ou au registraire et comporte dans l'ordre suivant :</p> <p>a) un avis de requête conforme au formulaire 47;</p> <p>b) tout affidavit nécessaire pour attester un fait dont la preuve n'est pas au dossier de la Cour;</p> <p>c) si le requérant le juge nécessaire, un mémoire conforme aux exigences prévues à l'alinéa 25(1)c), avec les adaptations nécessaires;</p> <p>d) les extraits pertinents des transcriptions ou des éléments de preuve, y compris les pièces, figurant au dossier présenté à la juridiction</p> |

|  |   |
|--|---|
| <p>intends to rely on transcripts or evidence from the record filed with the court appealed from, the relevant excerpts of the transcripts or evidence, including exhibits; and</p> <p>(e) except in the case of a motion for intervention, a draft of the order sought, including costs, in print and electronic format.</p> <p>(2) Parts I to V of the memorandum of argument shall not exceed 10 pages.</p> <p>(3) There shall be no oral argument on the motion unless a judge or the Registrar otherwise orders or directs.</p> | <p>inférieure que le requérant compte invoquer à l'appui de la requête;</p> <p>e) sauf dans le cas d'une requête en intervention, une ébauche de l'ordonnance demandée, notamment quant aux dépens, en version imprimée et en version électronique.</p> <p>(2) Les parties I à V du mémoire de la requête comptent au plus dix pages.</p> <p>(3) Sauf ordonnance ou directive contraire d'un juge ou du registraire, aucune plaidoirie orale n'est présentée à l'égard de la requête.</p> |
| <p>55 Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.</p>   | <p>55 Toute personne ayant un intérêt dans une demande d'autorisation d'appel, un appel ou un renvoi peut, par requête à un juge, demander l'autorisation d'intervenir.</p>   |