

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

B E T W E E N:

VOLTAGE HOLDINGS, LLC

APPLICANT

- and -

JOHN DOE #1 *et al.* and
the SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY
& PUBLIC INTEREST CLINIC
(See Schedule 1 for list of Doe Defendants)

RESPONDENTS

MEMORANDUM OF ARGUMENT OF THE RESPONDENT,
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST
CLINIC

(Pursuant to Rule 27 of the Rules of the Supreme Court of Canada)

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Part I OVERVIEW

1. The Applicant seeks leave to appeal a motions judge’s finding of fact and refusal to draw a factual inference to fill evidentiary gaps the Applicant chose to leave in its evidence. The Applicant raises two issues:

- a. the Applicant asks Canada’s highest Court to interfere with a motions judge’s fact-finding exercise in the face of the Applicant’s paltry evidentiary record; and
- b. the Applicant asks this Court to re-imagine Parliament’s intent in enacting the authorization right under the Copyright Act twenty years after having comprehensively interpreted that provision in *CCH*.¹

2. In bringing an application for leave to appeal, the Applicant dresses up the routine work of a motions judge assessing the evidence before her. The Federal Court of Appeal rightly declined to insert itself into the motions judge’s fact-finding exercise.

3. The Applicant’s theory of copyright infringement by authorization called on the lower courts to overturn this Court’s decision in *CCH* and a century of statutory interpretation of the authorization right. *CCH*’s authorization treatment has been applied without controversy for all of its 20 years. Neither the motions judge nor the Federal Court of Appeal encountered any difficulty whatsoever in understanding and applying *CCH*’s authorization standard.

4. The Applicant raises matters that are not of public importance but of private importance to the litigation strategy at the heart of its business plan. In any event, this application for leave to appeal originates with a motion for default judgement on an unchallenged evidentiary record. Any proceeding with this lineage is ill-suited to serve as a basis for a legal decision-making intended to have significant national influence.

Part II STATEMENT OF FACTS

5. The Applicant is a frequent plaintiff in mass copyright infringement lawsuits in Canada and around the world.

6. This application stems from an action joining multiple anonymous internet subscribers, each alleged to infringe The Applicant’s copyright in a film, *Revolt* (the “Work”).

¹ *CCH Canadian Ltd v Law Society of Upper Canada*, [2004 SCC 13](#) [*CCH*].

7. The Applicant’s legal theory exploits the Notice and Notice regime of the *Copyright Act*.² The Applicant sends notices alleging infringement to subscribers associated with Canadian IP addresses connected to the sharing of its Work through a peer-to-peer file-sharing network. If the Applicant again records sharing activity associated with that IP address, the Applicant sues the subscriber, alleging that it had authorized infringement since it had knowledge of the infringement yet failed to police its account.³

8. The Applicant sought default judgement against 30 of the 110 Defendants to that action. This motion “closes the loop” in the Applicant’s mass lawsuit: all other Defendants have either settled or had the action discontinued against them.

9. The Applicant filed evidence before the motions judge. That evidence was not tested by any Defendant. While CIPPIC intervened in the matter, its Order granting it intervener status did not include the right to file evidence or test the Applicant’s evidence.

10. The only evidence personal to any Defendant that the Applicant tendered was that each had a contract to subscribe for internet services.

11. Justice Furlanetto of the Federal Court concluded that it would not be just in the circumstances to award default judgement and dismissed the Applicant’s motion.⁴ She found that the Applicant had not provided sufficient evidence to establish the Default Respondents were direct infringers or possessed sufficient control to have authorized the infringement. Justice Furlanetto declined to draw an adverse inference against the Default Respondents without evidence that the Applicant sought to identify the user. Similarly, Justice Furlanetto rejected the Applicant’s theory of authorizing infringement, ruling that the Applicant could not establish the elements for a claim for authorizing infringement based solely on an internet subscription and deemed knowledge of infringing activity.

12. The Federal Court of Appeal affirmed Justice Furlanetto’s straight-forward execution of the duties of a motions judge.⁵ Writing for a unanimous Court, Justice Rennie held that there was no error in concluding that it was premature to draw an adverse inference against the unnamed Defendants. Justice Rennie had no difficulty in applying this Court’s decision in *CCH* to the

² *Copyright Act*, [RSC 1985, c C-42](#), s [41.25-41.27](#) [*Copyright Act*].

³ *Ibid*, s [3\(1\)](#).

⁴ *Voltage Holdings, LLC v Doe#1*, [2022 FC 827](#) [*FCC Reasons*].

⁵ *Voltage Holdings, LLC v Doe #1*, [2023 FCA 194](#) [*FCA Reasons*].

facts of the case, holding that the Federal Court correctly found that the Applicant had not yet proven any infringing activity.

Part III QUESTIONS IN ISSUE

13. The issue in this motion is: does the Applicant's proposed appeal raise an issue of public importance that warrants this Court's consideration?

14. The Applicant raises two issues that it argues are of national concern:

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

15. Neither issue is of sufficient public importance. Placed within the context of the decisions from which this matter arises, the Applicant:

- a. with the first issue asks the Supreme Court of Canada to interfere in the routine fact-finding exercise of a motions judge;
- b. with the second issue invites this Court to reinterpret and over-write Parliament's century-old intent in enacting the authorization right, and reverse the landmark unanimous decision of this Court in *CCH v the Law Society of Upper Canada*; and
- c. in the whole inappropriately asks this Court to consider of public importance matters arising from a default motion on an uncontested evidentiary record.

Part IV STATEMENT OF ARGUMENT

A. Justice Furlanetto's fact-finding is of private importance, not public importance.

16. The Applicant comes to this Court with a matter of private importance, not public importance: it disagrees with the routine fact-finding exercise of a motions judge on a motion for default judgement. The Court of Appeal recognized this dissatisfaction for what it is: a request of an appellate court to substitute its judgement for that of the trier of fact on the matter of inferences drawn from the evidence before her.

17. The Applicant’s plea is of private importance only:
- a. the Applicant asks this Court to “redo” a motions judge’s determination of whether the Applicant had tendered sufficiently clear, convincing and cogent evidence to establish liability;
 - b. Justice Furlanetto understood that Voltage elected not to pursue discovery options available to it;
 - c. the Applicant asks this Court to interfere with the fact-finding exercise of a motions judge;
 - d. the jurisprudence of this Court does not compel inferences of infringement without supporting evidence;
 - e. international copyright treaties do not compel inferences of infringement without supporting evidence; and
 - f. expeditious vindication of meritorious claims cannot come at the expense of justice: plaintiffs must prove their claims with clear and cogent evidence.

1. Justice Furlanetto correctly found the Applicant had not met its burden of proof.

18. 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*.

19. Justice Furlanetto correctly identified the burden on a plaintiff in a copyright action.⁶ In a default proceeding all allegations in the statement of claim are taken as being denied.⁷ The plaintiff bears the legal burden of proving its claims on a balance of probabilities with sufficiently clear, convincing, and cogent evidence.⁸

20. Justice Furlanetto carefully weighed the evidence and declined to find the Applicant’s evidence met its burden in two ways: (1) the Applicant failed to connect the Defendants to infringing conduct, and (2) the Applicant’s “thin evidence” presented a challenge to being able to conclude that infringement had occurred in each instance.⁹ The Applicant did not challenge this

⁶ *FCC Reasons*, *supra* note 4 at paras [35](#), [45](#).

⁷ *Federal Courts Rules*, [SOR/98-106](#), [s 184\(1\)](#) [*Rules*].

⁸ *FCC Reasons*, *supra* note 4 at para [45](#); *Tatuyou LLC v H2Ocean Inc*, [2020 FC 865](#) at paras [9](#), [25](#).

⁹ *FCC Reasons*, *supra* note 4 at paras [55](#), [57](#).

second conclusion. Its failure to do so alone should have proved fatal to its appeal before the Federal Court of Appeal.

21. The Applicant attempts to transform Justice Furlanetto’s fact-finding exercise of drawing factual inferences into a question of law. In *Benhaim*, this Court observed that whether an inference should be drawn is a question of fact that deserves deference from an appellate court.¹⁰ The Federal Court of Appeal appropriately deferred to Justice Furlanetto’s factual findings.

22. Justice Furlanetto’s fact-finding exercise on the Applicant’s motion for default judgment motion was a case-specific undertaking that is a matter of importance to the Applicant, but by definition, cannot rise to the level of public importance. It is a matter of private importance to the parties to the motion. But that exercise occurred in response to a unique evidentiary record, prepared by the Applicant and uncontested. It is not a matter of public importance.

23. It was possible, and required, that the Applicant produce evidence that the alleged infringer “did it.” As the Federal Court of Appeal correctly recognized, the Applicant could have attempted discovery from account holders. It did not pursue this option. It is not of public importance that the Applicant wishes to circumvent a discovery process.

2. The Applicant neglected to tender evidence specific to the Defendants.

24. The Applicant claims that it has provided “all that was possible.” The Applicant ignores that the motions judge identified additional avenues of proportionate discovery available to it.¹¹ 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. It chose not to.

25. The Applicant did not make “reasonable efforts” to identify the Defendants.¹² The Federal Court of Appeal decision in *TekSavvy* stands for the proposition that should have. There, the plaintiffs engaged in *diligent* investigations to identify defendants who made clear efforts to remain anonymous.¹³ These investigations went beyond those available to the plaintiffs through discovery mechanisms. Here, the Applicant did not engage in *any* investigations to identify the

¹⁰ *Benhaim v St-Germain*, [2016 SCC 48](#) at paras [50-52](#) [*Benhaim*].

¹¹ *FCC Reasons*, *supra* note 4 at para [50](#).

¹² *Joe Hand Promotions Inc v Social Major League Sports Bar & Grill*, [2009 FC 699](#) at paras [3-4](#).

¹³ *TekSavvy Solutions Inc v Bell Media*, [2021 FCA 100](#) at para [85](#).

Defendants. In *TekSavvy* the Court found further investigations would be fruitless; here, Justice Furlanetto found that further discovery would have been helpful.¹⁴

26. 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 that the specific Defendants before the court – the individual subscribers the Applicant identified – had committed a culpable act.

3. The Applicant improperly asks this Court to interfere with findings of fact.

27. The Applicant’s disagreement with the motions judge’s fact-finding is not a matter of public importance. As the Federal Court of Appeal affirmed, it was for the motions judge to assess whether the Applicant’s uncontested evidence showed that the internet subscriber was likely the individual who shared the Applicant’s Work.¹⁵ Justice Furlanetto, on the evidence before her, was not convinced that the internet subscriber identified in the Norwich motion was the direct infringer.¹⁶ The Federal Court of Appeal properly refused to interfere with this finding of fact, but regardless stated that it would agree with the Federal Court.¹⁷

28. The Applicant wrongly suggests that this Court’s reasons in *SOCAN v CAIP* “stated that liability could be found if nothing was done to stop infringing activity once notice had been given.”¹⁸ Justice Binnie’s *obiter* comments, considered more fully below, address the special case of internet service provider liability for authorization and occur in the context of a hypothetical. Justice Binnie concluded his discussion not with certainty, but with a caution as to the facts: “In sum, I agree with the Court of Appeal that ‘authorization’ could be inferred in a proper case but all would depend on the facts.”¹⁹

29. Copyright infringement must be proven through facts and evidence. As the Federal Court of Appeal recognized, an adverse inference on the basis of a flagged IP address and its corresponding subscriber alone would create a strict liability scheme for all infringing activities

¹⁴ *FCC Reasons*, *supra* note 4 at para [50](#); See also *ME2 Productions Inc v Doe*, [2019 FC 214](#) at paras [115-119](#), [126-129](#).

¹⁵ *FCA Reasons*, *supra* note 5 at para [60](#).

¹⁶ *FCC Reasons*, *supra* note 4 at para [52](#).

¹⁷ *FCA Reasons*, *supra* note 5 at para [72](#).

¹⁸ Voltage Memorandum of Argument at para 35.

¹⁹ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004 SCC 45](#) para [128](#) [CAIP].

associated with a given account.²⁰ The Applicant cannot rely on the availability of possible defences to fill the gaps in its evidence.

30. The Applicant wrongly alleges that the Federal Court of Appeal reverses the law of negative inferences established by this Court. The Court of Appeal did no such thing, instead routinely applying the law of evidence to affirm Justice Furlanetto’s approach.

4. The Applicant’s notices impose no legal duty on internet subscribers.

31. An internet subscriber’s decision not to act does not support any inference of authorization. The Applicant’s interpretation of *CAIP* and *Rogers* is unsupported.²¹ *CAIP* deals with the issue of intermediary liability in the very specific case of internet service providers.²² It does not deal with authorization generally. In *Rogers*, this Court simply noted that internet subscribers might have the ability to prevent future infringement.²³ *Rogers* does not impose on internet subscribers any positive obligations to halt infringement of the Applicant’s works. Neither case stands for the proposition that liability for authorizing can be found vicariously in the absence of evidence.

32. The Applicant mischaracterizes *Rogers*. This Court was clear: it is wrong in law to draw an inference that an internet subscriber is an infringer based on its associated IP address alone. This Court did not, as the Applicant suggests, place any onus on subscribers to identify the internet user at the time of an alleged infringement. Rather, *Rogers* stands for the proposition that, “being associated with an IP address...is not conclusive of guilt.”²⁴

33. The Applicant oversimplifies this Court’s statements in *Rogers* and in the same stroke asks for clarification on these simplified statements. No further guidance is required from this Court. In enacting the Notice and Notice regime,²⁵ Parliament did not intend to grant the Applicant a right to claim damages against an internet subscriber who has not responded to its demands.

²⁰ *FCA Reasons*, *supra* note 5 at para [64](#).

²¹ Voltage Memorandum of Argument at paras 35, 37.

²² *CAIP*, *supra* note 19 at paras [124-128](#).

²³ *Rogers Communications Inc v Voltage Pictures*, [2018 SCC 38](#) at para [35](#) [*Rogers*].

²⁴ *Ibid.* at para [41](#); see also paras [22-25](#) and [35](#).

²⁵ *Copyright Modernization Act*, [SC 2012, c 20](#) [*CMA*], introducing ss [41.25-41.27](#) of the *Copyright Act*, *supra* note 2.

5. WIPO does not provide that the Applicant can claim infringement without evidence.

34. The Applicant’s allegation that the motions 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 does not do away with the Applicant’s obligation at law to prove its case on a balance of probabilities with clear and cogent evidence. Nor do they do away with Parliament’s intent, in crafting the *Copyright Modernization Act*²⁶ and the Notice and Notice regime, to provide a regime that allows “copyright owners to protect and vindicate their rights quickly, easily and efficiently as possible while ensuring fair treatment of all.”²⁷

6. Expeditious proceedings cannot come at the expense of the burden of proof.

35. The Applicant suggests that being asked to meet its burden of proof in a copyright infringement action undermines the objective of providing claimants with expeditious resolution of meritorious claims. Regardless of the merit of expeditious legal vindication, that cannot come at the expense of a core tenet of the legal system: plaintiffs must prove their claims with clear and cogent evidence that, on a balance of probabilities, demonstrates the culpability of the defendant before the court.

36. 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. The decisions below applied a fair and proportionate procedure.

B. The Applicant’s scheme to overturn authorization law is not of public importance.

37. The Applicant asks this Court to overturn its previous interpretation of s. 3(1)’s authorization provision in *CCH* to better align the law with the Applicant’s mass copyright litigation business model. 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.

²⁶ *Ibid.*

²⁷ *Rogers*, *supra* note 23 at para 46.

38. This plea is of private importance only, and does not raise a matter of public importance:
- a. The Applicant asks the Court to overturn a pivotal precedent directly on point – *CCH Canadian Ltd v Law Society of Upper Canada*,²⁸ no less;
 - b. The decisions of Justice Furlanetto and of the Court of Appeal below do not address novel or unusual questions of law, but rather involve the routine application of Supreme Court of Canada precedent;
 - c. This Court in *Rogers v Voltage*²⁹ has already comprehensively addressed the operation and consequences of the Notice and Notice regime;
 - d. This Court in *SOCAN v ESA*³⁰ has already comprehensively addressed the application of the *Copyright Act* to different infringing activities online;
 - e. Technological neutrality cautions against the Applicant’s expansive position on authorization of digital infringements; and
 - f. The Applicant’s plea that this Court overturn its interpretation of the authorization right forgets the Court’s task is to interpret Parliament’s intent – an intent that does not “evolve” with technology.

1. The Applicant’s position asks this court to overturn *CCH*.

39. The Applicant asks this Court to abandon its interpretation of the authorization provision in *CCH*. This standard has been applied consistently and without confusion, including in this case. The *CCH* standard is harmonious with Parliament’s enactment of the Notice and Notice regime.

40. The meaning of “authorization” is a question of statutory interpretation: the provision is construed by considering its text, context, and purpose. This Court in *CCH* undertook this analysis to interpret the scope and meaning of the authorization right authoritatively and comprehensively. The text, context, and purpose of s. 3(1)’s authorization provision converge on a single conclusion: Parliament intended liability for authorization only where the authorizer sanctioned, approved, and countenanced the infringing activity of another.

²⁸ *CCH*, *supra* note 1.

²⁹ *Rogers supra* note 23.

³⁰ *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, [2022 SCC 30](#) [ESA].

41. In *CCH*, this Court interpreted Parliament’s intent in enacting the authorization right. This Court definitively held that “authorize” means to “sanction, approve and countenance,” and that “countenance ... must be understood in its strongest dictionary meaning, namely, ‘[g]ive approval to; sanction, permit; favour, encourage’.”³¹ The Court cautioned that “a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright.”³² One authorizing use of equipment enjoys a presumption that “a person who authorizes an activity does so only so far as it is in accordance with the law.”³³ This Court stated that “[t]his presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement.”³⁴ Note that the alleged authorizer’s “control” is over the infringer, not the equipment. It is for the plaintiff to rebut this presumption with evidence.

42. While the authorization provision is a century old, *CCH* is a decision of the digital age. In *CCH*, this Court expressly identified and rejected the test the Applicant asks this Court to apply: the Australian *Moorhouse* standard.³⁵ The Applicant seeks to replace *CCH*’s authorization standard with a policing standard – one would be liable for authorization where one has notice of another’s infringing conduct and control over the equipment involved, yet failed to police the conduct. This Court rejected this expansive standard on the basis of the balance principle: “the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner’s rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.”³⁶

43. The Applicant’s policing standard would violate the principle of technological neutrality. The Applicant would have this Court impose a different liability standard on internet subscribers than it imposed in *CCH* on photocopier providers.

2. The decisions below are consistent with past jurisprudence on authorization.

44. The lower court decisions are consistent with prior guidance from this Court. The authorization standard articulated in *CCH* has been consistently applied without confusion or division.

³¹ *CCH*, *supra* note 1 at para [38](#).

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid* at para [41](#).

³⁶ *Ibid.*

The remedy for a plaintiff seeking to bring a copyright infringement action is through discovery of the wrongdoer and with evidence to establish liability, as Justice Furlanetto and the Federal Court of Appeal affirmed.

45. The Applicant incorrectly suggests that *Salna*,³⁷ *ESA*,³⁸ and *CAIP*³⁹ have modified *CCH*, permitting the establishment of authorization through technological control. The Applicant is wrong: none of these decisions modify the standard for authorization.

46. *Salna* merely applied a motion to strike standard to permit the Applicant to make its policing argument. *ESA* provides a framework to identify the copyright interest implicated when one downloads or streams a work. *ESA* in no way replaces *CCH*'s test of authorization or its evidence requirement. *CAIP* deals with intermediary liability in the very particular case of internet service providers. It does not deal with authorization generally.

47. The Applicant's reliance on the decision of this Court in *SOCAN v CAIP* for support for overturning *CCH* merits particular comment. 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".⁴⁰ However, the Court clarified that all "would depend on the specific circumstances".⁴¹

48. The Applicant incorrectly suggests that the Federal Court of Appeal ignored Justice Binnie's *obiter* comments in *CAIP*.⁴² The Court of Appeal made no error in its consideration of *CAIP*. The particular *obiter* passage upon which the Applicant relies (1) is not binding on lower courts, (2) is no longer relevant given the enactment of the Notice and Notice regime, and (3) is not causing confusion or inconsistency in the application of *CCH*.

49. First, the Applicant errs in asserting that the *dicta* in *CAIP* was binding on lower courts. As held in *R v Henry*, not all *obiter* has, or is it intended to have, the same weight.⁴³ Where the Supreme Court deals with an issue definitively, the *dicta* have strong precedential value and is

³⁷ *Salna v Voltage Pictures, LLC*, [2021 FCA 176](#) [*Salna*].

³⁸ *ESA*, *supra* note 30.

³⁹ *CAIP*, *supra* note 19.

⁴⁰ *Ibid* at para [127](#).

⁴¹ *Ibid*.

⁴² Applicant's Memorandum of Argument, para 36.

⁴³ *R v Henry*, [2005 SCC 76](#) at para [57](#).

binding on lower courts. In contrast, where the Supreme Court only deals with an issue in passing, the *dicta* have weak precedential value. The *dicta* relied on by the Applicant falls into the latter category.

50. The *dicta* in *CAIP* lacks the binding precedential value as the issue was not before the Court nor was the *dicta* definitive. First, *CAIP* deals with intermediary liability in the very particular case of internet service providers. It does not deal with authorization generally. Second, the *dicta* relied on is not definitive on authorization. Justice Binnie emphasizes that the *dicta* is not meant to be interpreted as overruling *CCH*, which explicitly rejected a general obligation to take down infringing content.⁴⁴ The *dicta* is couched so as to be consistent with *CCH*'s "sanction, approve, and countenance" standard. In mooted the requirement of a takedown scheme Justice Binnie doesn't say that lack of action by a subscriber is sufficient to create liability as the Applicant suggests. Rather, Justice Binnie says liability "may" attach if an internet service provider fails to act and meets the *CCH* standard of demonstrating the defendant gave approval to "sanction, approve and countenance" the infringing content.⁴⁵

51. Second, Justice Binnie's *obiter* comments addressing the special case of ISP liability arose in the context of policy debates alive at the time. Justice Binnie's academic musings speculated about whether Canada should adopt a "notice and takedown" scheme or a notice and notice system which involved no takedown of infringing content. Justice Binnie references this debate in its discussion of foreign notice and takedown regimes. The *dicta* are dialogue between the Court and Parliament on issues of the time, not binding precedent. It is of historical and academic import, but not of public importance.

52. Parliament ultimately rejected the approach contemplated by Justice Binnie and opted for the approach embodied in our current Notice and Notice system.⁴⁶ The Applicant asks this Court to ignore Parliament's rejection of that policy option – mooted in respect of high-tech infrastructure services – and impose that rejected liability standard on the heads of ordinary Canadians who merely subscribe to home internet service.

⁴⁴ *CAIP*, *supra* note 19.

⁴⁴ *Ibid* at para [127](#) (citing *CCH* at para [38](#)).

⁴⁵ *Ibid*.

⁴⁶ *Copyright Act*, *supra* note 2.

53. As a matter of *stare decisis*, even if the *obiter* comments made by Justice Binnie could be viewed as binding, given the amendments made by Parliament in the *Copyright Modernization Act*,⁴⁷ they are no longer. As stated in *R v Kirkpatrick*, “[a]s a matter of *stare decisis*, a court is bound by a prior interpretation of a statutory provision...until the statutory provision is amended by the legislature.”⁴⁸ In enacting the Notice and Notice Regime, Parliament rejected the special authorization regime for ISPs mooted in paragraph 127 of *CAIP*, rendering the point void.

54. Third, Justice Binnie’s *obiter* comments in *CAIP* have created no circumstances warranting this Court’s attention. The enactment of the Notice and Notice scheme has not created confusion or difficulty in applying *CCH*. Neither Justice Furlanetto nor Justice Rennie had difficulty applying *CCH* to the facts of this case. The *dicta* the Applicant seeks to rely on has not been applied nor considered by any lower courts. There is no confusion or inconsistency in the application of *CCH* on the law of authorization.

3. The Notice and Notice Regime was made in and for the digital age.

55. The Applicant asks this Court to do what Parliament chose not to do when modernizing the *Copyright Act*: reinterpret “authorize” in violation of the legislation’s text, context, and purpose. In asking this Court to interpret the Notice and Notice regime for the digital age, the Applicant draws false equivalencies between the nature of statutory interpretation and the evolution of common law. This Court, in *Rogers*, interpreted the Notice and Notice regime. No amendments necessitate an exercise in the re-interpretation of the statute.

56. In *Rogers*, this Court affirmed that Notice and Notice is meant to occur prior to court proceedings. The Court cited an ISP representative in a House of Commons committee meeting stating that notice and notice is “not a silver bullet; it’s just the first step in a process by which rights holders can go after those they allege are infringing ... Then the rights holder can use that when they decide to take that alleged infringer to court.”⁴⁹

57. The Applicant ignores Parliament’s dual purposes in enacting the regime; however this Court did not, holding in *Rogers*: “The notice and notice regime was enacted as part of the CMA to serve two complementary purposes: (1) to deter online copyright infringement; and (2) to

⁴⁷ *CMA*, *supra* note 26.

⁴⁸ *R v Kirkpatrick*, [2022 SCC 33](#) at paras [130-131](#).

⁴⁹ *Rogers*, *supra* note 23 at para [24](#).

balance the rights of interested parties.”⁵⁰ In 2018, Parliament further amended the regime to improve its balance by addressing abuses for purposes other than its intended, limited role.⁵¹ Parliament intended the regime to balance interests of consumers, ISPs, and copyright holders rather than serve as a tool of copyright enforcement.

58. This balancing purpose reflects Parliament’s intent that the Notice and Notice regime not be adapted to attack infringers. If Parliament wanted the Notice and Notice regime to be used as a tool to create consequences for infringers, Parliament could have provided for the inclusion of actionable clauses in notices, or legislated positive obligations on recipient subscribers, or other enforcement mechanisms (or even penalties on, for example, repeat receipt of notices). Parliament chose not to do so. Rather, the Notice and Notice regime as set out in the *Copyright Act* precludes the possibility that notices include settlement offers, or requests or demands.⁵² The *Act* imposes no duty to act or other enforcement mechanism or penalty on subscribers in receipt of a notice.

59. Parliament could have implemented a notice and takedown system as a litigation support tool similar to what the Applicant is proposing here but chose not to do so. It explicitly did not do so. Parliament did not intend to relieve copyright owners of the costs of enforcing their rights. Copyright owners bear their enforcement costs. The Applicant’s policing standard flips that rule by imposing on equipment providers a duty to police activities of others without any Parliamentary signal to do so.

4. Liability of a subscriber depends on the rights infringed.

60. The Federal Court of Appeal correctly held that there is a distinction between “making available for download” and “making available for streaming” – consistent with this Court’s jurisprudence in *SOCAN v ESA*.⁵³ In *ESA*, this Court held that “making available for download” engages a copyright owner’s authorization right, while “making available for streaming” engages a copyright owner’s performance right.⁵⁴

⁵⁰ *Ibid* at para [24](#).

⁵¹ Bill C-86, *The Budget Implementation Act, 2018, No. 2*, [SC 2018, c 27, s 243](#); Parliamentary Information and Research Service, [Legislative Summary of Bill C-86](#), 42nd Parl, 1st Sess.

⁵² *Copyright Act*, *supra* note 2 s [41.25\(3\)](#).

⁵³ *ESA*, note 30.

⁵⁴ *Ibid* at para [8](#).

61. Authorizing one person to authorize a second person’s infringing reproduction cannot be copyright infringement as it would amount to “authorizing the authorizer”. This is simply a matter of statutory construction: authorization explicitly references the other rights granted in s. 3(1) and cannot be read to loop back on itself. This distinction also goes to the questions of proximity and culpability. As stated by Justice Arnold and Prof. Davies, “an ‘accessory to an accessory’ is too remote from the primary infringement”.⁵⁵ if such a person were held to be liable, the boundaries of liability would be extended too far. Liability must follow culpability.

62. Justice Arnold and Prof. Davies suggest that accessory liability for infringement should rest on the “principles of responsibility, culpability, and protecting rights”, but that “a balance needs to be struck when determining what constitutes “participation” or the appropriate “mental element”.⁵⁶ Liability for authorization under Canadian copyright law reflects this principled approach. *CCH* avoids extending liability with unanticipated consequences. In contrast, a policing standard:

- a. requires Canadians to police our neighbours’ communicative activities;
- b. chills expressive activity. A duty to cut off access to the internet silences both lawful and infringing speech and blocks essential services;
- c. expands liability and imposes burdens on all entities that provide access, from residential consumers to educational institutions, libraries, and coffee shops;
- d. imposes an unrealistic technological solutionism that confuses the means of communication with allegedly infringing content. Copyright vests in particular content, not in “ports”, communicative protocols, or devices; and
- e. sets too broad a scope for liability and will deter innovation in services and products that have substantial non-infringing uses.

63. Canadian law recognizes that liability should fall on the shoulders of accessories to a wrong. Parliament implements this principle in copyright’s authorization right. Liability of an Internet subscriber for another’s wrong accordingly must depend on the right infringed and the consequences of the rights and culpable actions. The Applicant’s policing standard burdens

⁵⁵ Richard Arnold and Paul S Davies, “Accessory liability for intellectual property infringement: the case of authorisation” [\(2017\) 133 L Q Rev 442](#) at 24-25.

⁵⁶ *Ibid* at 2.

parties who themselves have done no wrong with supervisory and technological obligations inconsistent with copyright's balance.

64. The Applicant relies on novel evidence not before this Court to falsely suggest that there is a “gap” in copyright protection.⁵⁷ There is not. The distinction between the performance and reproduction rights articulated by this Court in *ESA* merely acknowledges that different types of infringement engage different rights held by a copyright owner, consistent with the principle of technological neutrality.

65. Lower courts have correctly and consistently applied *CCH* harmoniously with the Notice and Notice regime enacted by Parliament. There is no division between the trial judge and appellate court, no division among academics, and no division among provinces. The Applicant simply wishes this Court to remake the law.

5. Technological neutrality cautions against the Applicant's case.

66. The Applicant's reliance on the principle of technological neutrality in support of its policing standard is similarly misplaced. The principle of technological neutrality supports the consistent application of the *CCH* test for authorization in varying contexts, from the photocopiers at issue there to the internet downloads at issue here. Differences in legal consequences flowing from different behaviours that infringe different rights does not violate technological neutrality.

6. Parliament's intent does not “evolve”.

67. The Applicant claims that it is of public importance that “this Court's jurisprudence evolve[s] with the times”.⁵⁸ The scope of the authorization right is a matter of statutory interpretation. It is not common law. Parliament crafted the authorization right in its enactment, and it remains consistent with Canada's international treaty obligations. This Court in *CCH* has definitively 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.

⁵⁷ Applicant's Memorandum of Argument at para 54.

⁵⁸ Applicant's Memorandum of Argument at para 36.

C. Default proceedings are inapt for addressing the Applicant’s theory.

68. The Applicant brings this application for leave to appeal in the context of a motion for default judgement. This is precisely the wrong kind of legal proceeding in which to address the issues the Applicant identifies as of public importance. This is because motions for default judgement (1) are inapt vehicles for addressing controversial legal theories and (2) take place against an uncontested evidentiary record.

1. Default motions are not the vehicles for testing controversial legal theories.

69. The Applicant wrongly argues that the Defendants’ defaults amount to a refusal to attorn to the Federal Court’s jurisdiction. The specific Rules addressing attornment have no application on these facts.⁵⁹ The Applicant seeks an adverse inference drawn against the Defendants for failing to participate in the proceeding.⁶⁰ To do so would erroneously ignore Rule 184(1) which deems denied all unadmitted allegations of fact in a pleading. Nor ought serious questions of law to be assessed in the context of default judgements.⁶¹

2. The Applicant’s evidentiary record is untested.

70. The Applicant’s evidentiary record is untested. No Defendants cross-examined the Applicant’s affiants or filed any evidence to contest the Applicant’s facts. Indeed, Justice Furlanetto did not find in fact that the individual Defendants received the notices, but instead presumed receipt of the notices by the ISP’s confirmation that the notices were sent.⁶² It is on the basis of this presumption that the Applicant grounds the Defendants’ knowledge of the alleged infringing activity.

71. This evidentiary record is inadequate to sustain a serious legal challenge to the ongoing validity of so significant legal principle as the basis for authorization in *CCH*. Should this Court ever choose to return its attention to the standard for authorization liability under the *Copyright Act*, it should do so on a case with a fulsome, contested factual record that can bear the weight of facts necessary to establish liability.

⁵⁹ *Rules*, *supra* note 7, note [Rule 208](#).

⁶⁰ Voltage Memorandum of Argument at para 29.

⁶¹ *L.S. Entertainment Group Inc v Formosa Video (Canada) Ltd*, [2005 FC 1347](#) at para [51](#), citing *Allied Colloids Ltd v Alkaril Chemicals Ltd*, (1990) 34 CPR (2d) 426 (FCTD).

⁶² *FCC Reasons* *supra* note 4 at [para 69](#).

72. The poverty of the Applicant’s evidentiary record is, in effect, recognized by the Applicant in its own materials in this Application. On two occasion the Applicant attempts to place evidence within its Memorandum of Argument:

- a. At paragraph 23 the Applicant footnotes to a CBC article to substantiate its claim that Canada is a “haven for piracy”. The reference is doubly improper as being evidence tendered for its truth while at the same time the article relies on an American trade association – a lobbying group promoting strong copyright laws on behalf of its American members.
- b. At paragraphs 51-53, the Applicant’s Argument details “streaming” services that promote “free movies”, including “the notorious *Popcorn Time* app.” The distinction between streaming and downloading services has no evidentiary foundation in the Applicant’s case.

73. In both instances, this evidence should be ignored.⁶³ The Applicant cannot engage in an attempt at “bootlegging evidence in the guise of authorities”.⁶⁴

Part V SUBMISSIONS CONCERNING COSTS

74. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it.

Part VI ORDERS SOUGHT

75. CIPPIC requests that this Court dismiss the Applicant’s motion for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of March, 2024.



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⁶³ *UL Canada Inc v Quebec (Attorney General)*, [2004 SCC 82](#).

⁶⁴ *Public School Boards Assn of Alberta v Alberta (Attorney General)*, [\[1999\] 3 SCR 845](#) at para 3.

Part VII TABLE OF AUTHORITIES

No.	Authority	Para.
Caselaw		
1.	<i>Benhaim v St-Germain</i> , 2016 SCC 48 .	21
2.	<i>CCH Canadian Ltd v Law Society of Upper Canada</i> , 2004 SCC 13 .	1, 3, 12, 15, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 54, 62, 65, 66, 67, 71
3.	<i>Joe Hand Promotions Inc v Social Major League Sports Bar & Grill</i> , 2009 FC 699 .	25
4.	<i>L.S. Entertainment Group Inc v Formosa Video (Canada) Ltd</i> , 2005 FC 1347 .	69
5.	<i>ME2 Productions Inc v Doe</i> , 2019 FC 214 .	25
6.	<i>Public School Boards Assn of Alberta v Alberta (Attorney General)</i> , [1999] 3 SCR 845 .	73
7.	<i>R v Henry</i> , 2005 SCC 76 .	49
8.	<i>R v Kirkpatrick</i> , 2022 SCC 33 .	53
9.	<i>Rogers Communications Inc v Voltage Pictures</i> , 2018 SCC 38 .	31, 32, 33, 35, 38, 55, 56, 57
10.	<i>Salna v Voltage Pictures, LLC</i> , 2021 FCA 176 .	45, 46
11.	<i>Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers</i> , 2004 SCC 45 .	28, 31, 45, 46, 47, 48, 49, 50, 53, 54
12.	<i>Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association</i> , 2022 SCC 30 .	38, 45, 46, 60, 64
13.	<i>Tatuyou LLC v H2Ocean Inc</i> , 2020 FC 865 .	19
14.	<i>TekSavvy Solutions Inc v Bell Media</i> , 2021 FCA 100 .	25

15.	<i>UL Canada Inc v Quebec (Attorney General)</i> , 2004 SCC 82 .	73
16.	<i>Voltage Holdings, LLC v Doe#1</i> , 2022 FC 827 .	3, 11, 12, 16, 17, 18, 19, 20, 21, 22, 24, 25, 27, 30, 38, 44, 54, 70
17.	<i>Voltage Holdings, LLC v Doe #1</i> , 2023 FCA 194 .	2, 3, 12, 16, 20, 21, 23, 27, 28, 29, 30, 38, 44, 48, 60
Secondary Sources		
18.	Richard Arnold & Paul S Davies, “Accessory liability for intellectual property infringement: the case of authorisation” (2017) 133 L Q Rev 442 .	61, 62
19.	Parliamentary Information and Research Service, Legislative Summary of Bill C-86 , 42nd Parl, 1st Sess.	57

Part VIII STATUTES, REGULATIONS, AND RULES

No.	Title	Titre	Section
1.	Bill C-86, <i>The Budget Implementation Act, 2018, No 2</i> , SC 2018, c 27 .	Projet de loi C-86, <i>Loi no 2 d'exécution du budget de 2018</i> , LC 2018 c 27 .	243
2.	<i>Copyright Act</i> , RSC 1985, c C-42 .	<i>Loi sur le droit d'auteur</i> , LRC 1985, c C-42 .	3(1) , 41.25 , 41.26 , 41.27
3.	<i>Copyright Modernization Act</i> , SC 2012, c 20 .	<i>Loi sur la modernisation du droit d'auteur</i> , LC 2012, c 20 .	
4.	<i>Federal Courts Rules</i> , SOR/98-106 .	<i>Règles des Cours fédérales</i> , DORS/98-106 .	184(1) , 208