

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230927

Docket: A-129-22

Citation: 2023 FCA 194

**CORAM: STRATAS J.A.
WEBB J.A.
RENNIE J.A.**

BETWEEN:

VOLTAGE HOLDINGS, LLC

Appellant

and

**DOE #1 *et al.*
(See Schedule 1 for list of Defendants)**

Respondents

and

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

Intervener

Heard at Toronto, Ontario, on March 28, 2023.

Judgment delivered at Ottawa, Ontario, on September 27, 2023.

REASONS FOR JUDGMENT BY:

RENNIE J.A.

CONCURRED IN BY:

**STRATAS J.A.
WEBB J.A.**

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REASONS FOR JUDGMENT

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RENNIE J.A.

[1] The appellant sought default judgment against the respondents for two types of copyright infringement: direct infringement and authorizing infringement. In respect of the first, the appellant asserted that the respondents directly infringed its copyright by making a protected work available for download online (by posting or uploading the work); in respect of the latter, the appellant asserted that the respondents authorized an unknown person to directly infringe the appellant's copyright. The Federal Court (2022 FC 827, *per* Furlanetto J.) dismissed the motion brought under Rule 210(1) of the *Federal Courts Rules*, S.O.R./98-106 (the Rules). This is an appeal from that decision.

[2] The appeal engages two issues. The first concerns the jurisprudence with respect to what constitutes direct infringement and authorizing infringement. The second issue is the burden of proof and the circumstances under which it can be discharged by drawing an adverse inference.

[3] These issues are closely interrelated. The jurisprudence with respect to the law of copyright determines the minimum evidentiary requirements to establish the asserted types of infringement; in other words, the jurisprudence constrains the extent to which an adverse inference may be drawn in the context of online copyright infringement.

[4] These reasons address this interrelationship, discuss the procedural and practical limitations of discovery in the context of online infringement, and offer guidance as to the application of the principles in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [*CCH*], *Society of Composers, Authors and Music Publishers of Canada*

v. Canadian Assn. of Internet Providers, 2004 SCC 45, [2004] 2 S.C.R. 427 [*SOCAN*], *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38, [2018] 2 S.C.R. 643 [*Rogers*], and *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, 471 D.L.R. (4th) 391 [*ESA*], in the circumstances presented by this particular case.

I. Background

[5] In 2012, Parliament enacted the *Copyright Modernization Act*, S.C. 2012, c. 20 (the CMA), to amend the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act) and respond to new technological pathways that facilitate online copyright infringement. The summary accompanying the CMA states that the amendments to the Act aim to “update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards.” The summary also notes that the amendments seek to “clarify Internet service providers’ liability and make the enabling of online copyright infringement itself an infringement of copyright.”

[6] The CMA established a system by which copyright owners may send a notice to internet service providers (ISPs), alleging online copyright infringement occurring at a particular electronic location called an Internet Protocol address (an IP address). On receipt, the ISP must forward a notice to the Internet subscriber corresponding to the IP address identified by the copyright owner. This is known as the “notice and notice” regime (the Act, ss. 41.25 and 41.26).

[7] The appellant, Voltage Holdings, LLC, is a movie production company and the owner of the copyright to the film *Revolt* (the Work). The appellant detected that internet users at certain IP addresses were making the Work available using BitTorrent software, a protocol for distributing files on a peer-to-peer network. BitTorrent is particularly well suited for transferring large files such as movies, music, or computer software due to its capacity to upload and download files from a group of hosts instead of from a single source server. Using this software, internet users at the flagged IP addresses were uploading and offering copies of the Work without the appellant's consent.

[8] Warning notices were sent to the internet subscribers through the notice and notice regime, advising that infringing activity had been detected at the internet subscribers' IP addresses. If a second instance of infringement occurred at the same IP address within seven days of the first notice, the appellant sent a second warning notice to the subscriber at the offending IP address. The appellant subsequently obtained *Norwich* orders requiring ISPs to provide it with information about the internet subscribers' identities based on the IP addresses at which the infringement was occurring. The appellant then served the respondents, a subset of all the internet subscribers who had received two warning notices, with a statement of claim. No defences were filed.

[9] The appellant next filed a motion for default judgment against the respondents. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) was granted leave to intervene and provided written submissions and oral argument at the hearing of the motion.

II. The Federal Court decision

[10] The Federal Court dismissed the motion for default judgment. It found that the respondents were in default of filing a defence, but determined that the appellant had not provided sufficient evidence to establish that the respondents either were the direct infringers themselves, or possessed sufficient control over those who posted the Work to have authorized the infringement (Reasons at paras. 26, 56, 70).

[11] Having considered the direction of the Supreme Court in *Rogers* at paragraphs 26 and 27, the Federal Court stated that the notice and notice regime was not an “absolute liability framework” and that there was “a presumption of innocence” for internet subscribers (Reasons at para. 42). The Federal Court noted that the notice and notice regime was not a complete solution to online copyright infringement and that infringement by internet subscribers, either direct or authorizing, must still be proven for the claim to succeed (Reasons at para. 42).

[12] The Federal Court rejected the appellant’s argument that the notices shifted the burden of proof to the respondents to disprove the allegations set out in its statement of claim. Instead, it noted that all allegations in a statement of claim are treated as denied in a default proceeding and that the appellant was “required to lead sufficient evidence to allow the [Federal] Court to conclude on a balance of probabilities that the [respondents were] the proper defendants [to the underlying action] and have infringed copyright” (Reasons at para. 45).

[13] With respect to the appellant's claim for direct infringement, the Federal Court declined to draw an adverse inference against the respondents without evidence that the appellant had sought to identify the BitTorrent user (Reasons at para. 52):

In my view, some attempt must be made to determine the internet user responsible for the alleged infringement before a presumption can arise that the internet subscriber is that user or a proper adverse inference can be drawn based on non-responsiveness.

[14] The Federal Court similarly rejected the appellant's theory of authorizing infringement; it decided that the appellant could not establish the elements of the claim for authorizing infringement based on the respondents' knowledge of the infringing activity alone. It held that to do so would undo the balance sought by the notice and notice regime (Reasons at paras. 67 and 68). Again, following the test established by the Supreme Court in *Rogers*, the Federal Court found that the appellant had not adduced "evidence as to the nature of relationship between the internet subscribers identified as the [respondents] and those that actually uploaded the unauthorized content," which, the Federal Court held, was required to make out the appellant's claim for authorizing infringement (Reasons at para. 70).

[15] The Federal Court concluded that discovery may uncover additional information to help the appellant make out this claim (Reasons at para. 70):

There is also no evidence as to what steps, if any, the internet subscribers have taken to prevent further alleged infringement. As previously noted, some form of discovery could be sought to seek these facts or any others that would support a finding of authorization or allow an adverse inference to be drawn.

[16] These reasons will explain why the Federal Court did not err in concluding that it was premature to draw an adverse inference against the respondents. The appellant had not yet

attempted to compel discovery of the respondents and their potential evidence. But the Federal Court was also right not to close the door on that possibility, otherwise there is a risk of creating a zone of immunity around online infringement. Robust jurisprudence supports the shifting of the burden of proof or drawing adverse inferences in circumstances where, as here, there is an informational imbalance or key evidence is uniquely in the hands of the defendant. Gaps in a plaintiff's evidence may be filled by an adverse inference or by the failure of a defendant to meet an evidentiary burden. The question, therefore, is not whether a court can shift the burden, but when and in what circumstances.

III. Submissions before this Court

[17] The appellant's primary complaint, in relation to its claim for direct infringement, lies with the Federal Court's decision not to draw an adverse inference against the respondents. The appellant says that this inference would have allowed the Federal Court to conclude that the respondents had uploaded the Work, and that the judge erred by not drawing the inference only because the appellant had not sought further discovery of the respondents. According to the appellant, once it put forward all the evidence that had been technologically available to it, what it describes as a "tactical" burden of proof shifted to each respondent to disprove that they had posted the Work online.

[18] CIPPIC, on the other hand, supports the Federal Court's understanding of the evidentiary principles on a motion for default judgment for claims of direct infringement. Citing *Snell v. Farrell*, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 [*Snell*], CIPPIC argues that the respondents bore no burden to disprove the appellant's allegations to the extent that the appellant itself was

unable to prove its case, and that the decision not to draw an adverse inference warrants deference on appeal (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 [*Benhaim*]). CIPPIC also says that the appellant did not undertake a diligent investigation to identify the individuals who uploaded the Work at the relevant IP addresses, unlike the successful copyright owner in *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100, 460 D.L.R. (4th) 136 [*TekSavvy*]. Because of this, CIPPIC says, the appellant has failed to provide any basis for an inference of direct infringement.

[19] The appellant's arguments take a different focus with respect to its claim of authorizing infringement. On this point, the appellant argues that the judge erred by requiring additional evidence of the respondent's personal control over those who posted the Work through the BitTorrent network. It argues that, to establish authorizing infringement, it only needed to prove the respondent's control over the internet accounts on which the infringement occurred. The appellant says that it has done so through the *Norwich* orders. In the appellant's view, the Federal Court ought to have inferred authorization from the respondents' control over their internet accounts, combined with their failure to respond to the notices of claimed copyright infringement, citing *SOCAN* at paragraphs 124-128.

[20] CIPPIC disagrees, arguing that the appellant's framing of authorizing infringement or indifference as wilful blindness by the internet subscriber is unsupported by decisions of the Supreme Court.

IV. The law of authorizing infringement

[21] The result of the appellant's action depends on the legal parameters of copyright infringement and the evidentiary principles guiding what is required to satisfy a trier of fact that the circumstances before him or her constitute infringement. This motion adds a further dimension: whether adverse inferences can be drawn at this point in the litigation. Because of this, the Federal Court's decision and the disposition of this appeal are more easily assessed when first framed by the state of the law on authorizing infringement.

[22] First, subsection 3(1) of the Act grants a copyright owner the exclusive right to produce (or reproduce), perform, or publish their work. It also grants a copyright owner the sole right to "authorize any such acts." Accordingly, anyone who authorizes any of these expressions of the copyrighted work, absent a licence to do so, infringes the copyright owner's exclusive authorization right (the Act, ss. 3(1) and 27(1)).

[23] Second, and relatedly, authorizing infringement requires that the authorizer hold themselves out as capable of granting one of the copyright owner's exclusive rights (Barry Sookman, Steven Mason & Carys Craig, *Copyright: Cases and Commentary on the Canadian and International Law*, 2nd ed. (Toronto: Carswell, 2013) at 1001):

To authorize an act, the alleged infringer must grant or purport to grant, either expressly or by implication, the right to do the act complained of. Further, the grantor must have some degree of actual or apparent right to control the actions of the grantee before he will be taken to have authorized the act. An act is not authorized by somebody who merely enables or possibly assists or even encourages another to do that act, but who does not purport to have any authority which he can grant to justify the doing of the act.

[24] Third, in copyright law, to “authorize” means to “sanction, approve and countenance” (*CCH* at para. 38). Although “countenance” in this definition may initially appear to include some degree of passivity within the scope of “authorization”, the Supreme Court has confirmed that the term “countenance” here “must be understood in its strongest dictionary meaning, namely, ‘[g]ive approval to; sanction, permit; favour, encourage’” (*CCH* at para. 38).

[25] Fourth, there are certain objective factors that, on their own, do not amount to authorizing infringement. An individual who provides the means or equipment to infringe another’s copyright has not necessarily authorized the infringement, for example (*ESA* at para. 106; *CCH* at para. 38). Similarly, upon receiving a warning notice, an internet subscriber is not automatically assumed to have been responsible for the asserted copyright infringement; the mere association with an IP address is not conclusive of guilt (*Rogers* at para. 41).

[26] Fifth, the law of authorizing infringement relies in part on a subjective standard. The knowledge that someone might be using neutral technology for infringing activity is not necessarily sufficient to establish authorization, and courts presume that an individual who authorizes an activity does so only so far as it is in accordance with the law (*SOCAN* at para. 127; *CCH* at para. 38; *Sookman* at 1002). In some cases, however, a “sufficient degree of indifference” may allow a court to infer that the individual has indeed authorized the infringement (*CCH* at para. 38; *SOCAN* at para. 127).

[27] Sixth, in authorization analyses, courts have historically considered the relationship between the alleged authorizer and the person who infringes as a result of the authorization. A

“certain relationship or degree of control” existing between these parties may rebut the presumption that a person who authorizes an activity has only authorized lawful forms of that activity (*CCH* at para. 38). Control over the means by which the infringement occurred may also warrant a finding of implicit authorization; additionally, authorization may be inferred where the supply of such means was “bound to lead to an infringement and was made specifically for that purpose” (Sookman at 1002). These factors suggest that the alleged authorizer played an active role in leading the other party to infringe the copyright owner’s exclusive rights under subsection 3(1) of the Act.

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[28] My final preliminary observation, and to foreshadow my reasoning, is that the jurisprudence on authorization, particularly the Supreme Court’s decision in *ESA*, provides a clear answer against the appellant’s argument that the respondents have authorized infringement.

[29] “Authorization” is a statutory term of art, integral to the operation of the Act and the identification of copyright infringement. The scope of authorizing infringement has been considered by the courts in different contexts, from a library’s provision of self-service photocopiers to an ISP’s knowledge of infringing content on their facilities. However, the plain and ordinary meaning of the word “authorization” also evokes a different response—a simple grant of permission. The premise of the appellant’s argument relies on this plain and ordinary meaning of the word “authorization”, which leads it to assert that there are two groups of infringers in the present appeal: internet users who have directly infringed its copyright, and internet subscribers who enable, or authorize, the infringement. The argument before the Federal

Court and the Federal Court's reasons were framed on this understanding as well, which results in a conflation of these two concepts of "authorization" with respect to copyright infringement.

[30] The decision of the Supreme Court in *ESA*—rendered six weeks after the release of the decision under appeal—illustrates this conflation. *ESA* is clear that authorization, in the context of online copyright infringement, is directed to and only possible in respect of those who make the copyrighted material available for downloading. While the appellant's argument takes a two-track approach to establish infringement, either direct or authorizing, the law with respect to authorization requires that its position distill to only a single argument of infringement; the appellant's arguments with respect to authorizing infringement are, in essence, evidentiary arguments in support of its claim of direct infringement. As I will explain, the appellant's theory of what I will characterize as "third party authorization"—which involves a subscriber's consent to sharing access to their internet account, and indifference to the purposes for which it is used—does not fit into the law of copyright as it is currently understood.

[31] The Supreme Court in *ESA* reiterated that, pursuant to subsection 3(1) of the Act, authors have only three copyright interests in their works: the right to produce or reproduce a work in any material form; the right to perform a work in public; and the right to publish an unpublished work (*ESA* at para. 54). An activity that engages one of the three copyright interests under subsection 3(1) is an infringement of copyright, pursuant to subsection 27(1) of the Act, since the activity would be something that only the owner of the copyright has the exclusive right to do (*ESA* at para. 104). On the other hand, an activity that does not engage one of the three copyright interests under subsection 3(1), or the author's moral rights, "is not a protected or compensable

activity under the [Act]” (*ESA* at para. 57). This distinction confirms that non-infringing activities end, and infringing activities begin, upon the triggering of a copyright interest in subsection 3(1).

[32] The Supreme Court then linked various infringing activities to the specific copyright interest triggered by each infringement, by examining what that activity does to the copyrighted work (*ESA* at para. 56). As Rowe J. explained, if a work is streamed or made available for on-demand streaming, the author’s performance right is engaged; if the work is downloaded, the author’s reproduction right is engaged; and, importantly, “if the work is made available for downloading, the author’s right to authorize reproductions is engaged” (*ESA* at paras. 8, 103, 106-108).

[33] The Supreme Court endorsed the Copyright Board’s determination that “it is the act of posting [the work] that constitutes authorization”, because the person who makes the work available “either controls or purports to control the right to communicate it”, and “invites anyone with Internet access to have the work communicated to them” (*ESA* at para. 106). The authorizer is the individual directly engaging with the copyrighted material. This close relationship between the authorizer and the copyrighted material is emphasized and repeated throughout the Supreme Court’s reasons (*ESA* at paras. 8, 103, 106-108).

[34] There is no question, based on *ESA*, that the person using the respondents’ internet accounts to make the Work available for download via BitTorrent is authorizing infringement. This situation is the precise example of authorizing infringement described throughout *ESA* (*ESA*

at paras. 8, 103, 106-108). However, the appellant's claim of authorizing infringement does not mirror this example. *ESA* says that an authorizer permits reproduction; the appellant says that an authorizer is someone who permits someone to permit reproduction. And, as Rowe J. observes, subsection 3(1) of the Act "exhaustively" sets out the scope of copyright interests (*ESA* at para. 54).

[35] Two questions on authorizing infringement therefore remain for this Court: first, whether as a factual matter the appellant has shown, on a balance of probabilities, that the respondents are themselves the individuals who made the Work available for download via BitTorrent (following the example of authorizing infringement from *ESA*); and second, whether the appellant has shown the respondents to have otherwise authorized infringement, based on the meaning of the jurisprudence set out above. As I previously mentioned, these questions engage evidentiary considerations, in light of the shifting burdens and adverse inferences urged upon the Court by the appellant.

[36] I conclude that the appellant has not shown any reversible error in the Federal Court's decision. This conclusion is based, in part, on my earlier observation that the thrust of the appellant's arguments before this Court are inconsistent with the Supreme Court's decision in *ESA*. I highlight as well that the first question described in the paragraph above reveals how the appellant's claim of direct infringement collides with the law on authorizing infringement following *ESA*. This collision is made abundantly clear when paragraph 2 of the appellant's memorandum of fact and law is juxtaposed with the direction from *ESA* that making a work available for downloading engages an author's authorization right:

Voltage has two theories of copyright infringement against the [respondents]: (a) infringement by the [respondents] making the Work available for download online (“**Direct Infringement**”); and (b) infringement by a respondent who authorized the direct infringement of the Work by an unknown person by not responding to warning notices indicating the Work was being infringed, and allowing the infringement to continue (“**Authorizing Infringement**”).

[Bold characters in original, underlining added.]

[37] Nonetheless, for the purposes of this appeal, I will deal with the reasons of the Federal Court and arguments before us as presented. I will explain, where necessary, why they do not align with *ESA* and the law of copyright infringement.

V. Burdens of proof and adverse inferences

[38] A defendant’s failure to file a defence means that no allegations of fact in a pleading are admitted (Rule 184(1); *Tatuyou, LLC v. H2Ocean Inc.*, 2020 FC 865, 176 C.P.R. (4th) 1 at para. 9 [*Tatuyou*]; *NuWave Industries Inc. v. Trennen Industries Ltd.*, 2020 FC 867, 177 C.P.R. (4th) 1 at para. 16 [*NuWave*]). Therefore, the appellant, as plaintiff before the Federal Court, bore the legal or persuasive burden of leading sufficient evidence to prove the necessary elements of its claim on a balance of probabilities (*Tatuyou* at paras. 9, 25; *NuWave* at para. 16).

[39] The legal burden of proof, sometimes called the “persuasive burden” (see *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3), never shifts, and the evidentiary building blocks by which it can be discharged may include affirmative evidence and adverse inferences. However it is discharged, the plaintiff in a civil case must prove its claims on a balance of probabilities with evidence that is “sufficiently clear, convincing and cogent” (*Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720 at para. 36; *Nelson (City) v. Mowatt*,

2017 SCC 8, [2017] 1 S.C.R. 138 at para. 40; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 at para. 46).

[40] The need for predictability in trial processes demands that the burden of proof be allocated according to rules of law and not *ad hoc* decisions by the trier of fact (Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022) at 105). Thus, normally, no true “shifting” of any legal burden occurs in the course of an action. The plaintiff must lead evidence on the required elements of the case, and matters of affirmative defence must be proved by the defendant (J. Kenneth McEwan, *Sopinka on the Trial of an Action*, 4th ed. (Toronto: LexisNexis, 2020) at 84). Which party bears the legal or persuasive burden of proof in relation to a fact or issue is governed by the substantive law, and the burden is always on the party asserting a proposition or fact that is not self-evident (*WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420 at para. 30; *Robins v. National Trust Co.*, [1927] A.C. 515, [1927] 2 D.L.R. 97 (P.C.) at 100-101).

[41] The evidential burden, in contrast, refers to a party’s obligation to establish, through sufficient evidence, the existence or non-existence of a particular fact or issue so that a particular argument is live before the Court (*R. v. Schwartz*, [1988] 2 S.C.R. 443, 55 D.L.R. (4th) 1 at 466-467 [*Schwartz*]). Unlike the party with the legal burden, the party with an evidential burden is not strictly required to convince the trier of fact of anything, since an issue can be put into play without being proven (*Schwartz* at 467). Thus, the use of the term “tactical burden” to describe the evidential burden has been criticized as evidential burdens are imposed by law and are not

matters of tactics (Lederman at 101, citing G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983); *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702 at paras. 11-12).

[42] While legally discrete, shifting evidentiary burdens and adverse inferences are closely related and frequently used interchangeably. The failure to respond with exculpatory evidence to evidence led by a plaintiff may have consequences for a defendant. As the Supreme Court noted, “[i]t is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant” (*Snell* at 329-330). In this sense, the term “tactical burden” is apt, as it reflects the dynamic of the trial process. As *Sopinka on the Trial of an Action* notes, “the use of the term ‘burden of proof’ is merely a compendious way of summarizing the consequences of calling no evidence to rebut the evidence which gives rise to the inference” (McEwan at 84-85).

[43] The consequences of calling no evidence to rebut inculpatory evidence in the context of online copyright infringement are a major issue on this appeal; a review of prior adaptations to the typical burden of proof in civil matters assists in identifying these consequences, if any.

(1) *Cook v. Lewis*, [1951] S.C.R. 830, [1952] 1 D.L.R. 1 [*Cook*]

[44] No judge or lawyer can forget *Cook v. Lewis*, the classic case we learned as students in the first-year of law school. There, a plaintiff had been shot during a hunting accident but was unable at trial to prove which of the two defendants was responsible.

[45] The Supreme Court held that, on proof that the plaintiff had been injured by one of the hunters, the onus shifted to each hunter to then establish that their conduct had not been negligent. Cartwright J., writing for the majority, determined that where a trier of fact could not ascertain which particular defendant had caused the plaintiff's injury, because either defendant could equally have been the cause of the injury, both should be held liable (*Cook* at 842). Rand J., in a concurring set of reasons later endorsed by the Supreme Court in *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 [*Hollis*], explained the policy rationale for such a reversal of the onus of proof: he reasoned that the defendants had, by their own conduct, "made more difficult if not impossible the means of proving" the plaintiff's case, and had "in effect, destroyed the victim's power of proof" (*Cook* at 832).

(2) *National Trust Co. Ltd. v. Wong Aviation Ltd. et al.*, [1969] S.C.R. 481, 3 D.L.R. (3d) 55 [*National Trust*]

[46] The impact of evidentiary voids created by defendants is also observed in bailment cases. In *National Trust*, the Supreme Court adopted the following rationale for imposing a burden on the defendant bailee (at 489):

Lord Justice Atkin explains the grounds upon which the principle [governing the burden of proof in bailment cases] is founded, and I quote his language as follows: "The bailee knows all about it; he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that that duty has been discharged."

[47] The Supreme Court in *National Trust* stressed that this rule of evidence, which effectively requires a defendant or bailee to prove a negative (that they were not negligent in handling the bailor's chattel), should only be invoked in circumstances where all considerations

stipulated by Lord Atkin apply (*National Trust* at 489). Ritchie J. wrote that he “[did] not think it desirable, except in the clearest of cases, for a question of liability to be determined on the sole ground that the strict rules of evidence regarding the shifting of the onus of proof have not been complied with” (*National Trust* at 491). This led to the Supreme Court’s later observation in *Snell* that the legal burden may be reversed if the rationale for its original allocation—that the party asserting an issue is in the best position to prove it—is absent.

(3) *Snell v. Farrell*, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289

[48] In *Snell*, Sopinka J. noted that the allocation of the burden of proof is a flexible concept. He confirmed that the Supreme Court “has not hesitated to alter the incidence of the ultimate burden of proof when the underlying rationale for its allocation is absent in a particular case”, referring to *National Trust* and *Cook* (*Snell* at 321). A defendant’s unique opportunity of knowledge with respect to the facts to be proved may open the door to an adverse inference being drawn, and “very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary” (*Snell* at 328-329, 335-336).

[49] The Supreme Court then went on to distinguish the case before it from *Cook*, where the reversal of the burden of proof was justified as the defendants’ own tortious conduct had destroyed the plaintiff’s means of proof. In *Cook*, the Supreme Court held, the injury was not caused by “neutral conduct”; it was therefore “quite a different matter” to reverse the burden of proof where the injury may very well be due to factors “unconnected to the defendant and not the fault of anyone” (*Snell* at 327). The Supreme Court continued, noting that while it was not

accurate to describe the burden as shifting to the defendant, the plaintiff may nevertheless adduce sufficient evidence to warrant an adverse inference against the defendant (*Snell* at 329-330):

Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden... In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.

(4) *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3 [*Rainbow Caterers*]

[50] In *Rainbow Caterers*, the Supreme Court reiterated that the legal burden is not immutable, citing *National Trust* and *Snell*. The Supreme Court framed the evidentiary procedure applicable to the matter on the basis of which party had advanced which issue (*Rainbow Caterers* at 15):

Once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue. It is an issue that requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence. In the absence of evidence to support a finding on this issue, should the plaintiff or defendant bear the risk of non-persuasion? Must the plaintiff negate all speculative hypotheses about his position if the defendant had not committed a tort or must the tortfeasor who sets up this hypothetical situation establish it?

[51] The Supreme Court found that it was for the defendant to make out its case on an issue set up by it, to temper the quantification of damages as proved by the plaintiff. It observed that “[v]alid policy reasons will be sufficient to reverse the ordinary incidence of proof”, and that the matter before it warranted such a reversal; the defendant had asked the court to arrive at a conclusion opposite that asserted by the plaintiff regarding what would have occurred in the

hypothetical world, and therefore bore the burden of displacing the plaintiff's assertion of the state of affairs as they had previously existed (*Rainbow Caterers* at 15-16).

(5) *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609

[52] In *Hollis*, the Supreme Court determined that a manufacturer of breast implants had a duty to warn physicians of risks associated with the implants.

[53] The appellant in *Hollis* struggled with an evidentiary hurdle similar to that facing the appellant in the present matter. While the appellant's "power of proof" had not been destroyed as it had been in *Cook*, it nevertheless was "seriously undermined" by the manufacturer's insistence that she prove a hypothetical series of events: that her physician would have relayed to her all warnings from the manufacturer, had he indeed received information from the manufacturer regarding the risks of ruptured implants (*Hollis* at 683).

[54] Although the physician's conduct may have itself contributed to the breach of the appellant's right to informed consent, the Supreme Court did not require the appellant to definitively eliminate every other possible cause of her injury before holding the manufacturer liable. The Supreme Court decided that it was not for the plaintiff, Ms. Hollis, to prove that her doctor would have passed on the warning to her; she was in a position of "informational inequality" with respect to this issue, and had clearly "played no part in creating the set of causal conditions leading to her injury" (*Hollis* at 683).

(6) *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352

[55] The Supreme Court in *Benhaim* dealt with a similar tension between the evidence required of a plaintiff on the one hand, and the limitations on the evidence made available by a defendant on the other. In *Benhaim*, the Supreme Court determined that, although a physician's negligence had undermined the plaintiff's ability to prove causation in a medical liability case, the trial judge was not obligated to draw an adverse inference against the defendant (*Benhaim* at paras. 41-42). In cases where the plaintiff's quest for evidence is frustrated by the defendant's negligence, "an adverse inference of causation *may* discharge the plaintiff's burden of proving causation", but "[t]hose circumstance do not *trigger* such an inference" (*Benhaim* at para. 42, emphasis in original). The Supreme Court highlighted the permissive language that figures in case law describing trial judges' exercise of their discretion to draw adverse inferences (*Benhaim* at paras. 43, 52).

[56] The Supreme Court concluded that uncertainty or speculation about a defendant's evidence is insufficient to warrant the drawing of an adverse inference (*Benhaim* at para. 44). Instead, decisions to draw an adverse inference must be based on "an evaluation of all of the evidence", including the weaknesses in the plaintiff's own evidence (*Benhaim* at para. 44). To approach the decision in any other way, where an adverse inference is triggered only by a scarcity of evidence, would have "the same effect as impermissibly reversing the burden of proof" (*Benhaim* at paras. 44, 68). The Supreme Court found that such an approach, in the context of the medical liability case before it, "risks turning defendant professionals into insurers" (*Benhaim* at para. 68).

[57] A review of burdens of proof and adverse inferences arguably pulls in favour of the appellant's position. Taken together, *Cook*, *National Trust*, *Snell*, *Rainbow Caterers*, *Hollis*, and *Benhaim* show that the allocation of the burden of proof must be responsive to the parties, their respective abilities to procure or access critical evidence, and the issues raised in the matter. They also show that inferences may be drawn where a plaintiff cannot reasonably be expected to prove every aspect of their injury.

[58] These overarching themes collide, however, with the reality that copyright law is statutory, and that both "infringement" and "authorization" are statutory terms whose scope and content has been judicially defined (*CCH* at paras. 9 and 38; *SOCAN* at para. 82; *ESA* at paras. 71, 104-107; *Compo Co. Ltd. v. Blue Crest Music et al.*, [1980] 1 S.C.R. 357, 105 D.L.R. (3d) 249 at 372-273). In this way, *CCH*, *SOCAN*, *Rogers* and *ESA* establish minimum evidentiary requirements of a successful claim of infringement. More specifically, this jurisprudence does two things: it prescribes certain facts that must be established to prove infringement, and it allows for the drawing of adverse inferences of infringement based on the overall state of the evidence.

VI. Analysis of the Federal Court's decision

The appellant's claim of direct infringement

[59] The appellant says that the respondents have directly infringed its copyright by making the Work available for download online through BitTorrent. It says that it has advanced all of the evidence that is "technologically possible" in respect of this claim, and that the Federal Court

should have drawn an adverse inference to close any remaining evidentiary gap left by these limitations, thereby allowing the appellant's claims of direct infringement. It also says that the respondents' repeated non-response to the appellant's allegations necessitates that an adverse inference be drawn against them. Finally, the appellant argues that the Federal Court erred by declining to draw any such adverse inference on the basis that the appellant had failed to seek further discovery of the respondents.

[60] I disagree that the Federal Court erred in its application of the legal principles relevant to adverse inferences or in its weighing of the evidence before it. In any event, the Federal Court's decision not to draw an adverse inference in this context is a question of fact warranting deference on appeal, subject to the correctness of the legal principles guiding its assessment of the claims (*Benhaim* at para. 42).

[61] The Supreme Court's decision in *Rogers* is largely dispositive of the appellant's argument with respect to its claim of direct infringement. The Supreme Court there acknowledged "that there will likely be instances in which the person who receives notice of a claimed copyright infringement will not in fact have illegally shared copyrighted content online" (*Rogers* at para. 35). An internet subscriber therefore cannot be assumed to be the individual responsible for any infringing activity connected to their internet account (*Rogers* at para. 41):

It must be borne in mind that being associated with an IP address that is the subject of a notice under s. 41.26(1)(a) is not conclusive of guilt. As I have explained, the person to whom an IP address belonged at the time of an alleged infringement may not be the same person who has shared copyrighted content online. It is also possible that an error on the part of a copyright owner would result in the incorrect identification of an IP address as having been the source of online copyright infringement.

[Emphasis added.]

[62] A further comment is in order.

[63] A presumption of innocence underlies Parliament's choice of a notice and notice regime over a notice and take down regime. The presumption does not mean, though, that the notices have no evidentiary value or that there is some heightened obligation on a plaintiff to prove its case beyond the usual civil standard of the balance of probabilities. To the contrary, the notices are a relevant part of the factual matrix before the judge hearing the action. They are not neutral facts.

[64] I return to *Benhaim*, where the Supreme Court declined to draw an adverse inference on the basis of a scarcity of evidence alone, as “[s]hifting the consequences of causal uncertainty in [that] manner [risked] turning defendant [medical] professionals into insurers” (*Benhaim* at para. 68). The analogy to the facts in this appeal is patent: drawing an adverse inference, on the basis of the link between a flagged IP address and its corresponding internet subscriber would make subscribers strictly liable for all infringing activity associated with their account, a result that the Supreme Court has clearly rejected (*Rogers* at paras. 26 and 41).

[65] The appellant's argument regarding its inability to collect further evidence is, in the absence of an attempt to obtain discovery from the account holder, unpersuasive. The appellant's assertion that it could not have proven more than it did, technologically speaking, does not afford it more flexibility in the weighing of its evidence, lower the applicable standard of proof, or displace what must be advanced to establish a copyright owner's claim of infringement. Legal

burdens are not shifted to the defendant merely because the plaintiff has put forward all of the evidence possible.

[66] Further, adverse inferences do not necessarily follow only because a party has presented all the evidence “reasonably available” to it on an *ex parte* motion. The appellant was still required to prove its claims of infringement to the Federal Court on a balance of probabilities. The Federal Court found that it had failed to do so, and I see no error in this conclusion in light of the guidance from *Rogers* that a mere association with an offending IP address is not conclusive that the corresponding internet subscriber shared copyrighted material online (Reasons at para. 56; *Rogers* at paras. 35 and 41).

(1) *Cases relied on by the appellant*

[67] The appellant relies on *TekSavvy* to argue that, once copyright owners have completed all reasonable investigations, they cannot be required to undertake further investigations. Although this Court in *TekSavvy* concluded that “additional efforts to [identify, locate, and engage directly with] the defendants would have been fruitless”, it arrived at this conclusion after noting that “[t]he plaintiffs clearly adduced evidence of efforts to find the defendants” (*TekSavvy* at para. 85).

[68] In contrast, the Federal Court in this case concluded that the appellant had made no attempt to determine the internet user responsible for the alleged infringement beyond seeking the *Norwich* orders (Reasons at para. 52), and that further discovery may uncover helpful information (Reasons at para. 50). The plaintiffs in *TekSavvy* had evidently gone further in their

investigations than did the appellant in the present case. This factual distinction limits the relevance of *TekSavvy* to this case.

[69] The appellant also relies on *Trimble Solutions Corporation v. Quantum Dynamics Inc.*, 2021 FC 63, 187 C.P.R. (4th) 36 [*Trimble*] for the proposition that default judgment may be granted even where the Federal Court cannot discern the identity of the individual using the infringing software. However, this case does not stand for so broad a proposition. The Federal Court in *Trimble* granted a motion for default judgment based on the particular set of facts before it, which included evidence connecting the defendants to the instances of direct infringement.

[70] Again, no similar evidence was before the Federal Court. Although the appellant obtained the *Norwich* orders to obtain the respondents' names and addresses from their ISPs, this evidence does not link the respondents to the infringing activity as did the evidence in *Trimble*. The hostnames, usernames, and e-mail addresses associated with the infringing activity in *Trimble* were inherently identifying pieces of information that strengthened the connection between the infringement and the person associated with these identifiers, and supported the inferences drawn by the judge (*Trimble* at para. 60). There was "no doubt", in the end, that the devices used for the infringing activities were under the control of the defendants and located at their premises (*Trimble* at para. 60).

[71] The appellant's evidence that an internet subscriber is often the individual using BitTorrent software to distribute files does not overcome the speculation required to conclude that these particular respondents, in this particular case, are the infringing internet users (Perino

Affidavit at para. 16, Appeal Book at 203). The appellant itself acknowledged that “it is well known that home internet accounts can be used by more than one person” in its written submissions (Appellant’s memorandum of fact and law at para. 32).

[72] Apart from the *Norwich* orders and the appellant’s software, which linked the posting of the Work to a particular IP address, no other evidence before the Federal Court identified the respondents as the internet users who uploaded the Work. As described above, the appellant bore the burden of providing the Federal Court with this evidence. The Federal Court was not bound to accept that the respondents were the uploaders simply because no evidence before it pointed to anyone else as an uploader. Although it accepted that individuals using each respondents’ IP address had infringed the appellant’s copyright by uploading the Work, the Federal Court found that it could not conclude at this time that the respondents were themselves those particular individuals (Reasons at paras. 32-33, 56). I agree.

(2) *Consequences of failing to defend*

[73] The appellant stresses that the respondents have passed up four occasions to provide exculpatory evidence (after the first notice was sent, after the second notice was sent, after receiving the statement of claim, and after being sent a reminder of the statement of claim). It says that the respondents’ default status itself “demands” that an adverse inference be drawn against them.

[74] The essence of the appellant’s argument on this point blends the two-step consideration that a court undertakes when faced with a motion for default judgment. A finding that the

defendant is in default is only the first of two steps that a plaintiff must satisfy to be successful on a motion for default judgment; to satisfy the second step, the plaintiff must also provide the court with sufficient evidence to support its particular claim (*Chase Manhattan Corp. v. 3133559 Canada Inc.*, 2001 FCT 895, 2001 CarswellNat 2492 (WL Can) at para. 5; *Canada v. Thiel*, 2016 FC 137, 2016 CarswellNat 242 (WL Can) at para. 1; *Canada v. Zielinski Brother's Farm Inc.*, 2019 FC 1532, 2019 CarswellNat 7286 (WL Can) at para. 1).

[75] A failure to defend, when coupled with other probative evidence, leaves a defendant vulnerable to an adverse inference. The fact that a defendant is noted in default at the first stage does not itself require that an adverse inference be drawn at the second stage of this analysis. It is the second stage of the analysis that requires a weighing of the evidence and an assessment of whether the plaintiff has made out its claims. If the fact that a defendant was in default automatically allowed for adverse inferences at the second stage of the test for motions for default judgment, plaintiffs on *ex parte* motions for default judgment would need to present no evidence to the court in order to be successful. Some evidence is required.

[76] Turning to the appellant's final argument with respect to its claim of direct infringement, I find that the Federal Court did not err by requiring the appellant to seek discovery of the respondents before drawing an adverse inference against them. I disagree with this characterization of the Federal Court's decision on this point, as I do not read it as requiring that this step be taken for purely procedural, formalistic, or symbolic reasons. The Federal Court instead offered that "further discovery or a request for further information" may provide the very evidence that the appellant was lacking in its attempt to show conduct that legally constituted

infringement (Reasons at para. 50). Focusing on the evidentiary requirements of the appellant's claim, the Federal Court correctly held that "something more is needed than the bare assertion that a subscriber is, by default, the user responsible for infringement" (Reasons at para. 55).

[77] I agree with the appellant, however, that it would have been an error for the Federal Court to require that the appellant discover the respondents' devices or electronic records as a pre-condition to drawing an adverse inference or making a finding of infringement. The Federal Court does appear to have alluded to such a requirement, stating that "some attempt must be made to determine the internet user responsible for the alleged infringement before... a proper adverse inference can be drawn based on non-responsiveness" (Reasons at para. 52).

[78] To the extent that this comment introduces some procedural condition to claims of copyright infringement, I disagree. What ultimately matters in copyright litigation is whether the copyright owner, substantively, made out its claim of infringement on a balance of probabilities. However, given my prior conclusion that the appellant had failed to provide the Federal Court with sufficient evidence necessary to establish a link between the respondents and the infringing activity, no adverse inference could properly have been drawn in the circumstances, regardless of the procedural steps undertaken by the appellant.

The appellant's claim of authorizing infringement

[79] The appellant contends that the Federal Court erred by requiring that the appellant establish the scope of control that the respondents had over the person who posted the Work online prior to granting default judgment. The appellant also argues that the respondents were

wilfully blind to the infringement of its copyright, in light of the continued infringement despite having received two notices alleging infringing activity at their IP addresses. The appellant submits that its evidence—that two notices were sent to the respondents, and that the respondents are the internet subscribers associated with the offending IP addresses—is sufficient to conclude that the respondents exercised control over the use of their internet account and the devices connected to it so as to have authorized the infringement.

[80] These arguments fail for two reasons.

[81] The first is rooted in the Supreme Court’s definition of “authorize” (*CCH* at para. 38):

“Authorize” means to “sanction, approve and countenance”. Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, “[g]ive approval to; sanction, permit; favour, encourage”: see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. This 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.

[Citations omitted, emphasis added.]

[82] “Authorization” therefore depends on the alleged authorizer’s control over the person who committed the resulting infringement; it does not depend on the alleged authorizer’s control over the supply of their technology (*CCH* at paras. 38 and 45; *Sookman* at 1002). Allowing the “mere use of equipment that could be used to infringe copyright”, which at best is all we have here, does not fall within the legal definition of “authorizing” (*CCH* at paras. 38, 42-43). The

Federal Court adhered to this principle, and found that the appellant had not proven any activity beyond the respondents' sharing of their internet accounts (Reasons at paras. 59, 68 and 70).

[83] As the appellant notes, its argument of authorizing infringement has previously been before this Court in *Salna v. Voltage Pictures, LLC*, 2021 FCA 176, 469 D.L.R. (4th) 342 [Salna]. Importantly, though, the Court considered the appellant's argument in the context of a certification motion, which does not call for an assessment of the merits of the argument (*Salna* at para. 77). Assessing only whether the appellant had pled a reasonable cause of action, the Court determined that the appellant had shown that it had a "novel but arguable claim" of authorizing infringement (*Salna* at para. 83). This conclusion does not represent an acceptance of the genre of authorizing infringement as framed by the appellant; rather, it represents an acceptance of this genre as arguable. As the Court noted in *Salna*, it was up to the appellant to prove its claims at the hearing on the merits (*Salna* at para. 84); the Federal Court in this case found that the appellant had not provided sufficient evidence to do so (Reasons at paras. 62-63).

[84] The second reason for the failure of the appellant's claim of authorizing infringement is, as discussed already, the Supreme Court's decision in *ESA*.

[85] *ESA* establishes clear guidance as to the legal and evidentiary requirements of infringement in the context of online infringement. To establish an infringing activity, there must be evidence that what the activity does to the work engages one of the three interests in subsection 3(1) of the Act (*ESA* at paras. 56-57). Posting a work online and inviting others to view it engages the author's authorization right; however, sharing internet access after receiving

notices of alleged infringement does nothing to the work in question, and does not therefore engage any copyright interest granted to the author exclusively (*ESA* at paras. 56-57, 106; the Act, ss. 3(1) and 27(1)). Because the latter scenario arises here, the activity asserted by the appellant as “authorization” cannot justify protection under the Act.

VII. Conclusion

[86] In the factual matrix of this case and at this relatively early stage of this case, the defendants’ lack of participation in litigation does not offset the plaintiff’s lack of evidence. The Federal Court was not obligated to draw an adverse inference at this stage of the litigation merely because the respondents had, by their silence, not put forward sufficient evidence to rebut the appellant’s allegations (*Benhaim* at para. 42).

[87] For the reasons above, I would dismiss this appeal. As neither the appellant nor CIPPIC seeks costs, none should be awarded.

“Donald J. Rennie”

J.A.

“I agree.
Stratas J.A.”

“I agree.
Webb J.A.”

**SCHEDULE 1 – LIST OF DEFENDANTS AND SPECIFIC INFORMATION
REGARDING INFRINGEMENTS OF SUCH DEFENDANTS**

	Name & Address	IP Address	1 st Notice Date & Time (UTC) of Infringement	2 nd Notice Date & Time (UTC) of Infringement
1.	Doe #1, name and address unknown	156.34.2.57	2017-09-23 12:14:22	2017-10-03 15:41:47
2.	Doe #2, name and address unknown	156.34.180.12	2017-09-23 14:26:32	2017-10-01 03:36:54
3.	Doe #3, name and address unknown	142.162.128.245	2017-09-23 14:13:46	2017-10-01 10:05:58
4.	Doe #4, name and address unknown	47.54.165.90	2017-09-22 21:55:01	2017-10-02 23:33:27
5.	Doe #5, name and address unknown	156.57.220.81	2017-09-24 14:49:05	2017-11-03 00:35:45
6.	Doe #6, name and address unknown	108.175.82.55	2017-09-24 23:55:18	2017-10-03 21:25:32
7.	Doe #7, name and address unknown	47.55.135.155	2017-09-28 12:02:47	2017-10-06 16:46:00
8.	Doe #8, name and address unknown	99.192.57.154	2017-10-03 15:46:37	2017-10-15 17:37:56
9.	Doe #9, name and address unknown	99.192.98.62	2017-10-21 01:18:19	2017-10-29 01:16:02
10.	Doe #10, name and address unknown	156.34.231.116	2017-10-23 21:20:10	2017-11-08 04:56:55
11.	Doe #11, name and address unknown	99.192.98.54	2017-10-31 15:58:55	2017-11-08 02:13:16
12.	Doe #12, name and address unknown	142.166.216.146	2017-11-02 00:08:42	2017-11-10 04:39:17
13.	Doe #13, name and address unknown	142.177.66.92	2017-11-22 12:29:40	2017-11-30 00:30:50
14.	Doe #14, name and address unknown	47.55.141.234	2017-12-06 05:04:51	2017-12-17 10:23:54
15.	Doe #15, name and address unknown	142.167.107.117	2018-01-08 02:54:10	2018-01-16 07:38:54
16.	Doe #16, name and address unknown	142.162.97.180	2018-01-08 22:17:39	2018-01-22 04:03:57
17.	Doe #17, name and address unknown	70.26.9.128	2017-09-04 15:47:34	2017-09-22 20:40:39
18.	Doe #18, name and address unknown	67.68.98.171	2017-09-09 17:37:40	2017-09-24 19:40:14
19.	Doe #19, name and address unknown	67.68.221.129	2017-09-21 18:07:52	2017-09-30 15:19:05
20.	Doe #20, name and address unknown	76.68.210.170	2017-09-23 04:08:35	2017-10-07 23:12:04
21.	Doe #21, name and address unknown	64.228.79.220	2017-09-23 02:44:57	2017-10-01 00:14:25
22.	Doe #22, name and address unknown	70.51.181.6	2017-09-21 23:51:26	2017-10-20 13:09:37
23.	Doe #23, name and address unknown	65.93.22.84	2017-09-23 14:20:10	2017-11-01 01:52:09
24.	Doe #24, name and address unknown	65.93.37.104	2017-09-22 20:29:47	2017-10-01 02:13:30

	Name & Address	IP Address	1 st Notice Date & Time (UTC) of Infringement	2 nd Notice Date & Time (UTC) of Infringement
25.	Doe #25, name and address unknown	70.52.111.190	2017-09-24 23:22:52	2017-10-06 01:28:51
26.	Doe #26, name and address unknown	174.95.209.150	2017-09-28 20:57:47	2017-10-10 00:16:33
27.	Doe #27, name and address unknown	174.91.58.211	2017-10-01 19:28:16	2017-10-12 07:30:15
28.	Doe #28, name and address unknown	69.158.120.153	2017-10-02 02:10:25	2017-10-15 18:12:41
29.	Doe #29, name and address unknown	69.157.112.66	2017-10-08 17:07:02	2017-10-26 09:23:29
30.	Doe #30, name and address unknown	70.54.41.122	2017-10-09 23:43:14	2017-10-19 08:17:40
31.	Doe #31, name and address unknown	76.68.166.197	2017-10-18 14:47:27	2017-10-28 15:44:59
32.	Doe #32, name and address unknown	174.94.24.88	2017-10-25 04:34:03	2017-11-12 04:05:48
33.	Doe #33, name and address unknown	76.68.165.22	2017-10-28 17:13:06	2017-11-19 05:22:22
34.	Doe #34, name and address unknown	70.55.183.190	2017-11-02 18:51:24	2017-11-11 03:31:49
35.	Doe #35, name and address unknown	70.53.243.234	2017-11-05 15:17:04	2017-12-01 23:56:50
36.	Doe #36, name and address unknown	67.70.141.111	2017-11-22 21:18:01	2017-12-01 16:44:10
37.	Doe #37, name and address unknown	174.89.225.185	2017-11-23 04:26:11	2017-12-08 22:56:01
38.	Doe #38, name and address unknown	50.100.143.185	2017-12-05 02:37:09	2017-12-26 21:59:23
39.	Doe #39, name and address unknown	70.26.230.20	2017-12-11 10:14:24	2017-12-19 08:30:27
40.	Doe #40, name and address unknown	65.92.242.120	2017-12-10 10:35:07	2017-12-19 02:23:52
41.	Doe #41, name and address unknown	174.91.250.77	2017-12-13 01:14:38	2017-12-22 02:07:19
42.	Doe #42, name and address unknown	76.64.239.125	2017-12-12 22:24:35	2017-12-23 01:07:57
43.	Doe #43, name and address unknown	70.31.230.190	2017-12-13 06:05:28	2017-12-21 09:26:03
44.	Doe #44, name and address unknown	70.26.203.10	2017-12-13 05:52:54	2017-12-21 04:56:51
45.	Doe #45, name and address unknown	74.12.216.135	2017-12-13 05:47:10	2017-12-22 01:36:51
46.	Doe #46, name and address unknown	70.49.66.137	2017-12-13 05:46:33	2017-12-21 19:44:48
47.	Doe #47, name and address unknown	67.68.201.148	2017-12-13 05:02:09	2017-12-21 08:04:36
48.	Doe #48, name and address unknown	184.145.217.50	2017-12-13 02:10:19	2017-12-21 19:19:35
49.	Doe #49, name and address unknown	70.30.248.51	2017-12-13 00:41:32	2017-12-21 03:10:12
50.	Doe #50, name and address unknown	70.51.141.35	2017-12-13 11:00:17	2017-12-21 09:45:38

	Name & Address	IP Address	1 st Notice Date & Time (UTC) of Infringement	2 nd Notice Date & Time (UTC) of Infringement
51.	Doe #51, name and address unknown	65.92.23.220	2017-12-15 05:04:17	2017-12-25 01:13:54
52.	Doe #52, name and address unknown	70.49.77.208	2017-12-15 18:16:58	2017-12-24 03:42:10
53.	Doe #53 name and address unknown	184.148.213.254	2017-12-17 07:22:22	2017-12-26 04:41:57
54.	Doe #54, name and address unknown	70.53.216.231	2017-12-17 07:15:20	2018-01-12 00:00:01
55.	Doe #55, name and address unknown	76.69.176.159	2017-12-18 00:58:02	2017-12-26 04:53:20
56.	Doe #56, name and address unknown	174.92.168.219	2017-12-19 08:26:54	2018-01-03 12:56:12
57.	Doe #57, name and address unknown	50.100.131.28	2017-12-20 23:14:07	2017-12-29 15:04:57
58.	Doe #58 name and address unknown	70.30.252.247	2017-12-20 23:08:22	2017-12-31 02:49:11
59.	Doe #59, name and address unknown	70.55.52.99	2017-12-24 05:25:07	2018-01-01 22:58:59
60.	Doe #60, name and address unknown	76.68.216.130	2017-12-25 05:04:52	2018-01-04 07:00:02
61.	Doe #61, name and address unknown	70.31.231.239	2017-12-28 11:53:40	2018-01-05 01:22:19
62.	Doe #62, name and address unknown	174.95.184.185	2017-12-29 03:47:51	2018-01-13 03:39:00
63.	Doe #63, name and address unknown	184.144.235.232	2017-12-30 11:35:25	2018-01-07 06:08:07
64.	Doe #64, name and address unknown	76.69.134.82	2018-01-01 23:48:55	2018-01-15 05:11:09
65.	Doe #65, name and address unknown	76.71.168.102	2018-01-03 03:32:41	2018-01-18 02:42:22
66.	Doe #66, name and address unknown	174.95.132.108	2018-01-04 01:18:07	2018-01-18 22:35:41
67.	Doe #67, name and address unknown	69.156.112.15	2018-01-05 11:06:28	2018-01-23 15:47:35
68.	Doe #68, name and address unknown	67.70.207.242	2018-01-07 06:17:38	2018-01-15 04:51:47
69.	Doe #69, name and address unknown	74.14.196.10	2018-01-10 04:34:22	2018-01-18 03:33:40
70.	Doe #70, name and address unknown	67.68.60.66	2018-01-18 00:38:08	2018-01-27 02:07:11
71.	Doe #71 name and address unknown	99.250.77.228	2017-08-09 02:25:50	2017-09-19 23:39:18
72.	Doe #72 name and address unknown	99.254.226.230	2017-08-08 04:08:35	2017-10-07 04:50:47
73.	Doe #73 name and address unknown	174.119.133.153	2017-08-16 02:02:32	2017-09-09 00:55:40
74.	Doe #74 name and address unknown	99.242.225.141	2017-08-26 23:11:41	2017-09-29 16:38:41
75.	Doe #75 name and address unknown	99.243.54.76	2017-09-23 13:47:35	2017-10-01 19:52:51
76.	Doe #76 name and address unknown	174.115.223.47	2017-09-23 12:59:57	2017-10-01 05:25:36

	Name & Address	IP Address	1 st Notice Date & Time (UTC) of Infringement	2 nd Notice Date & Time (UTC) of Infringement
77.	Doe #77 name and address unknown	99.225.244.134	2017-09-23 01:32:44	2017-10-01 13:10:09
78.	Doe #78 name and address unknown	99.251.17.193	2017-09-22 20:08:09	2017-12-05 06:34:35
79.	Doe #79 name and address unknown	99.238.24.230	2017-09-21 20:40:34	2018-01-03 23:39:31
80.	Doe #80 name and address unknown	174.113.37.233	2017-09-23 10:20:25	2017-12-16 11:58:11
81.	Doe #81 name and address unknown	99.251.36.235	2017-09-23 21:20:25	2017-10-02 01:38:37
82.	Doe #82 name and address unknown	99.240.232.60	2017-09-23 18:23:11	2017-10-06 18:41:04
83.	Doe #83 name and address unknown	174.119.76.216	2017-09-23 17:50:23	2017-10-02 03:40:33
84.	Doe #84 name and address unknown	174.113.26.41	2017-09-23 14:39:49	2017-10-20 15:16:17
85.	Doe #85 name and address unknown	99.242.168.234	2017-09-24 04:39:22	2017-10-04 01:19:55
86.	Doe #86 name and address unknown	174.115.198.172	2017-09-24 15:23:27	2017-10-02 13:05:11
87.	Doe #87 name and address unknown	174.118.22.63	2017-09-25 00:58:28	2017-10-03 02:50:52
88.	Doe #88 name and address unknown	99.250.125.39	2017-09-25 00:39:34	2017-10-03 05:10:33
89.	Doe #89 name and address unknown	174.117.250.146	2017-09-25 08:21:03	2017-10-03 00:53:48
90.	Doe #90 name and address unknown	99.248.48.8	2017-09-25 08:00:36	2017-10-09 06:45:26
91.	Doe #91 name and address unknown	99.233.136.132	2017-09-25 02:25:26	2017-10-09 06:52:02
92.	Doe #92 name and address unknown	99.237.68.211	2017-09-24 12:42:10	2017-10-06 18:28:45
93.	Doe #93 name and address unknown	174.112.229.30	2017-09-27 13:39:43	2017-10-05 12:42:04
94.	Doe #94 name and address unknown	99.255.192.147	2017-09-27 21:39:25	2017-10-11 20:40:35
95.	Doe #95 name and address unknown	99.237.79.94	2017-10-01 03:20:36	2017-10-15 03:27:19
96.	Doe #96 name and address unknown	174.115.30.171	2017-10-01 13:20:23	2017-10-11 01:21:58
97.	Doe #97 name and address unknown	99.248.153.126	2017-10-02 23:25:56	2017-10-15 20:10:47
98.	Doe #98 name and address unknown	99.249.220.227	2017-10-04 02:52:08	2017-10-15 20:09:51
99.	Doe #99 name and address unknown	99.232.231.43	2017-10-05 21:33:07	2017-12-17 05:50:09
100.	Doe #100 name and address unknown	99.251.120.204	2017-10-14 00:42:35	2017-11-06 20:36:14
101.	Doe #101 name and address unknown	174.117.230.105	2017-10-24 00:49:47	2017-11-12 04:35:48
102.	Doe #102 name and address unknown	99.249.114.233	2017-10-28 01:13:01	2017-11-09 08:17:16

	Name & Address	IP Address	1 st Notice Date & Time (UTC) of Infringement	2 nd Notice Date & Time (UTC) of Infringement
103.	Doe #103 name and address unknown	99.239.4.175	2017-10-28 07:37:12	2017-11-08 02:30:02
104.	Doe #104 name and address unknown	99.246.146.0	2017-11-05 21:57:09	2017-11-17 02:05:40
105.	Doe #105 name and address unknown	99.230.78.111	2017-11-09 06:35:11	2017-11-26 00:35:21
106.	Doe #106 name and address unknown	99.246.169.135	2017-11-29 07:16:31	2017-12-07 03:20:41
107.	Doe #107 name and address unknown	99.237.251.93	2017-12-19 18:59:47	2018-01-06 08:18:28
108.	Doe #108 name and address unknown	99.243.10.135	2017-12-25 01:12:13	2018-01-02 00:00:26
109.	Doe #109 name and address unknown	99.224.179.37	2017-12-30 01:43:44	2018-01-10 05:17:44
110.	Doe #110 name and address unknown	99.242.155.58	2018-01-06 01:05:59	2018-01-19 22:46:58

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-129-22

STYLE OF CAUSE: VOLTAGE HOLDINGS, LLC v.
DOE #1 *et al.*, and SAMUELSON-
GLUSHKO CANADIAN
INTERNET POLICY AND
PUBLIC INTEREST CLINIC

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 28, 2023

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: STRATAS J.A.
WEBB J.A.

DATED: SEPTEMBER 27, 2023

APPEARANCES:

Kenneth R. Clark
Lawrence Veregin

FOR THE APPELLANT

David A. Fewer

FOR THE INTERVENER

SOLICITORS OF RECORD:

Aird & Berlis LLP
Toronto, Ontario

FOR THE APPELLANT

Samuelson-Glushko Canadian Internet
Policy and Public Interest Clinic (CIPIC)
Ottawa, Ontario

FOR THE INTERVENER